85-1433

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

GLORIA RICHARDSON, WARDEN,
PETITIONER
vs.
CLARISSA MARSH
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE SIXTH CIRCUIT COURT OF APPEALS

JOHN D. O'HAIR
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County of Wayne

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QUESTION PRESENTED

I.

SHOULD CERTIORARI BE GRANTED TO RESOLVE THE SPLIT OF AUTHORITY, INVOLVING AT LEAST SEVEN FEDERAL CIRCUITS, AS TO WHETHER THE ADMISSION OF THE REDACTED CONFESSION OF A CODEFENDANT, WHICH DOES NOT INDICATE IN ANY MANNER THAT RESPONDENT WAS INVOLVED IN ANY WAY IN THE CRIME CHARGED (HERE, A DOUBLE FELONY/MURDER), CAN BE HELD TO FALL WITHIN THE RULE OF BRUTON V UNITED STATES BY WAY OF "EVIDENTIARY LINKAGE" OR "CONTEXTUAL IMPLICATION" (PARTICULARLY WHERE THE "LINKAGE" IS PROVIDED BY THE TESTIMONY OF THE RESPONDENT HERSELF)?

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vs.

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RESPONDENT

PETITION FOR A WRIT OF CERTIORARI

TO THE SIXTH CIRCUIT

COURT OF APPEALS

NOW COMES Gloria Richardson, Warden, by John D. O'Hair, Prosecuting Attorney for the County of Wayne, and Timothy A. Baughman, Chief of the Criminal Division, Research, Training and Appeals, and prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the Sixth Circuit of the United States,

entered in the above-entitled cause on January 23, 1986.

OPINIONS BELOW

The opinion of the Federal District Court is appended as Appendix A. The opinion of the Sixth Circuit Court of Appeals is appended as Appendix B.

STATEMENT OF JURISDICTION

The judgment of the Sixth Circuit of the Court of Appeals was entered on January 23, 1986. The jurisdiction of this Court is invoked under 28 USC (1254.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in

pertinent part:

> ...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Sixth Amendment to the United States Constitution provides, in part, that "in all criminal prosecutions the accused shall enjoy the right...to be confronted with the witnesses against him."

STATEMENT OF THE CASE

The following statement of the case was drawn largely from the statement of

facts in the opinion of the Sixth Circuit in this case.

Petitioner Marsh was tried jointly with her co-defendant Benjamin Williams pursuant to an information charging her with the felony murder of Ollie Scott and Koran Knighton in the perpetration of a robbery pursuant to Mich. Comp. Laws Ann. Sec. 750.316 and with assault of Cynthia Knighton with intent to murder pursuant to Mich. Comp. Laws Ann. Sec. 750.83.

Cynthia Knighton testified that on October 29, 1978, she went with her son to the house of her aunt, Ollie Scott. Knighton was upstairs with her son when she heard voices downstairs, and came downstairs and saw Martin, Marsh's boyfriend, and Marsh. Scott introduced Knighton to Marsh, they all sat down and conversed, and Marsh said she had come to pick something up. Martin pulled out a

gun, pointed it at them, and said "someone had gotten killed and that my aunt knew something about it." Marsh said something similar, and walked over to the front door. Martin grabbed Scott, and Marsh looked out the peephole. The doorbell rang and Marsh let in defendant Williams, holding a handgun. Williams said "I'm so-and-so's brother," and "[w]here's the money?" Martin took Scott upstairs, and Williams walked through the lower level of the house, at which time Knighton attempted to flee through the front door. Marsh grabbed her and held her until Williams returned, whereupon he told the Knightons to lay on the floor. Williams went upstairs and Marsh refused to give Knighton a drink of water, but looked out the peephole. When the three came downstairs, Martin gave Marsh a paper grocery bag. Martin took Scott to the basement and Williams took the Knightons into the basement. Williams

said "Hurry up and tie them up," and Martin said "We're going to have to hurt them." Knighton heard two shots. Then Martin, holding a blanket in front of his gun, shot Knighton three times. Thereafter, she telephoned the police.

Defendant Marsh objected at trial to the introduction of Williams' statement to the police even after the references to Marsh had been deleted: "[T]here are certain inferences that are raised by this statement even in its altered form that would tend to incriminate my client." The court overruled petitioner's objection and allowed introduction of Williams' statement as follows:

> On Sunday evening, October the 29th, 1978, at about 6:30 p.m., I was over to my girl friend's house at 237 Moss, Highland Park, when I received

a phone call from a friend of mine named Kareem Martin. he said he had been looking for me and James Coleman, who I call Tom. He asked me if I wanted to go on a robbery with him. I said okay. Then he said he'd be by and pick me up. About 15 or 20 minutes later Kareem came by in his black Monte Carlo car. I got in the car and Kareem told me he was going to stick up this crib, told me the place was a numbers house. Kareem said there would be over $5,000 or $10,000 in the place. Kareem said he would have to take them out after the robbery. Kareem had a big silver gun. He gave me a long barrelled .22 revolver. We then drove over to this house and parked the car across the big street near the house. The plan was that I would wait in the car in front of the house and then I

would move the car down across the big street because he didn't want anybody to see the car. Okay, Kareem went up to the house and went inside. A couple of minutes later I moved the car and went up to the house. As I entered, Kareem and this older lady were in the diningroom, a little boy and another younger woman were sitting on the couch in the front room. I pulled my pistol and told the younger woman and the little boy to lay on the floor. Kareem took the older lady upstairs. He had a pistol, also. I stayed downstairs with the two people on the floor. After Kareem took the lady upstairs I went upstairs and the lady was laying on the bed in the room to the left as you get up the stairs. The lady had already given us two bags full of money before we even got upstairs.

Kareem had thought she had more money and that's why we had went upstairs. Me and Kareem started searching the rooms but I didn't find any money. I came downstairs and then Kareem came down with the lady. I said, "Let's go, let's go." Kareem said no. Kareem then took the two ladies and little boy down the basement and that's when I left to go to the car. I went to the car and got in the back seat. A couple minutes later Kareem came to the car and said he thinks that the girl was still living because she was still moving and he didn't have any more bullets. He asked me how come I didn't go down the basement and I said I wasn't doing no shit like that. He then dropped me back off at my girl's house in Highland Park and I was supposed to get together with him today, get my share of the

> robbery after he had counted the money. That's all.

(Emphasis added). The court delivered the following instruction to the jury.

> The statement of co-defendant Williams has been admitted into evidence against him only. I caution you that it may be used in considering only the guilt or innocence of Defendant Benjamin Williams. Under the rules already given to you, it must not be used or considered in any way against Defendant Clarissa Marsh.

Marsh testified that she met Martin in 1977 and had a relationship with him. Marsh testified that she often borrowed money so that Martin could purchase drugs. Martin lived in Marsh's house and refused to leave at her direction.

Martin physically abused Marsh and in June 1978 she was hospitalized following a suicide attempt. Marsh worked with and borrowed money from Ollie Scott in the summer of 1978.

On October 29, 1978, Marsh lost her wallet with Martin's drug money at Eastland Shopping Center. Martin was upset and suggested that Marsh borrow money from Scott. After dropping her children off at a Halloween party, Marsh and Martin picked up Williams. Petitioner stated that during the drive to Scott's house, she heard no conversation about a robbery. Martin and Marsh went to Scott's house where Marsh asked for a loan. Martin pulled a gun out and Marsh walked over to the door. Marsh testified that she looked out the door to see where the car was, that she did not feel free to leave, and that she opened the door to let Williams in.

Marsh testified that she did not try to escape because she was scared and Marsh admitted that she blocked Knighton's attempt to escape but does not know why or what happened. Martin came downstairs and handed Marsh a bag. Marsh testified that she never heard anything said about anyone being hurt, shot or killed. After Martin, Williams and the victims went into the basement. Marsh left the house without the bag. Marsh testified that she never intended to rob or kill anyone, and that she did not know that anyone was armed.

In closing argument, the prosecutor noted:

> [T]he same law that applies to Mr. Williams applies to Clarissa Marsh as well. The People must prove the same elements that I talked about in my discussion about Mr. Williams.

> Her guilt, of course, is to be determined separately from the evidence but you may consider the same evidence that you heard from the witness stand. The only thing that the Court will instruct you that you cannot consider is that statement that was made by the Defendant Williams. You cannot consider that statement when you determine her guilt or innocence. To do so would be unfair.

Further,

> [i]t's important in light of her testimony when she says Kareem drives over to Benjamin Williams' home and picks him up to go over. What's the thing that she says?" "Well, I'm sitting in the back seat of the car." "Did you hear any conversation that was going on in

> the front seat between Kareem and Mr. Williams?" "No, couldn't hear any conversation. The radio was too loud." I asked you whether that is reasonable. Why did she say that? Why did she say she couldn't hear any conversation? She said, "I know they were having conversation but I couldn't hear it because of the radio." Because if she admits that she heard the conversation and she admits to the plan, she's guilty of at least armed robbery. So she can't tell you that. How else do you know that she planned the robbery and was guilty of First Degree Felony Murder as well as the robbery?

(Emphasis added). Further, "Clarissa Marsh was in the planning stages of the robbery." Defense counsel argued that "[y]ou never heard anything about anyone

saying anything in her presence about hurting anyone." In its instructions to the jury, the court repeated its instruction limiting the admissibility of the Williams statement.

On April 23, 1979, Williams and Marsh were convicted on all counts. On May 2, Marsh was sentenced to life imprisonment on the first and second counts and 60 to 90 years on the third count. On December 17, 1980, the Michigan Court of Appeals affirmed the convictions. The court held that the trial court had applied the wrong standard in assessing the motion for directed verdict, but that the evidence was sufficient to support the conviction under the correct standard. The court found that malice could be inferred from Marsh's admission of Williams, Marsh's holding of the grocery bag, Marsh's guarding of the door, and

Marsh blocking Knighton's escape. The court stated:

> A split of opinion still exists on this Court over the issue of whether, in a felony-murder case, malice may be imputed from the underlying felony or merely inferred from the circumstances surrounding the killing, including the underlying felony....We believe Fountain presents the better view and hold that malice may not be imputed, as a matter of law, from the underlying felony. Accordingly, the evidence presented at the time of the motion had to sufficiently show that Williams acted with the intent to kill or in reckless disregard of a known and high degree of risk that death or serious bodily harm might occur.

(Footnote omitted). Further, "[t]he evidence indicated that Marsh knowingly participated in an armed robbery in reckless disregard of circumstances that indicated a high degree of risk that death or serious bodily harm could result." The court also rejected Marsh's Sixth Amendment argument. With respect to the assault charge, the court held:

> [T]he issue is whether the evidence was sufficient to show that Marsh aided and abetted the assult with the specific intent to murder Knighton or with the knowledge that Martin had this specific intent ....Marsh's case presents a much

closer question on this issue than does Williams'. There was no testimony indicating she harbored an intent to murder Knighton, nor was there any showing that she heard Martin's statements regarding the need to "hurt" or "take out" the victims. There was, in addition, no testimony placing her in the basement, the scene of the shootings. The evidence does indicate, viewed in the light most favorable to the prosecution, that she was aware that Williams and Martin were armed, that she served as a guard or "lookout" at the door, that she prevented an attempted escape by Knighton, and that she was given the paper bag thought to contain the proceeds of a robbery. The evidence also indicates that Marsh knew Scott, supporting the inference that it was Marsh who

> allowed Martin to gain entrance. While it is a close question, we believe the evidence presented at the time of the motion was sufficient to survive a motion for directed verdict.

(Emphasis added). On February 5, 1982, the Michigan Supreme Court denied Marsh's application for leave to appeal, and, on April 30, denied her motion for reconsideration.

On July 6, 1983, Marsh filed her petition for a writ of habeas corpus contending that she was denied her right of confrontation when Williams' statement was read to the jury, and that she was denied due process by denial of her motion for directed verdict when the evidence was insufficient for conviction. On October 11, 1983, the district court denied the petition. The court rejected

Marsh's Bruton argument on the ground that Williams' statement did not implicate Marsh at all, and that it was improper to consider the other evidence introduced at trial to construe the statement as implicating Marsh. With respect to the sufficiency of the evidence the court adopted the reasoning of the Michigan Court of Appeals.

REASONS FOR GRANTING THE WRIT

As the statement of the case indicates, the confession of codefendant Williams was redacted to the point that it only indicated involvement in the murders on the part of Williams and coactor Kareem Martin, who was at large and not on trial. There is no indication, nor any possible inference that can be drawn, from the confession itself, that a third party (the

Respondent, or anyone else) was involved in the crime in any way. No letters or symbols were used in place of Respondent's name--any possible reference or inference to involvement of another person in the offense was completely eradicated from the confession.

Respondent herself testified in a manner which placed her conduct within portions of the confession given by Williams. She testified that she was in the auto where Williams and Martin planned the robbery but did not hear the conversation. Her testimony was consistent with that of the survivor of the events regarding Respondent's participation in the crime, but she testified that she acted in the manner she did because she was afraid. She testified that she did not intent to rob or kill anyone and did not know that anyone was armed.

The Sixth Circuit Court of Appeals found that "evidentiary linkage" or "contextual linkage" is to be looked to in order to determine whether the confession of the codefendant is "powerfully incriminating" of the defendant/Respondent. Here, the court observed that "In this case Marsh's own testimony connects her to the car ride in which the killings were allegedly discussed. The value of cross-examining herself, of course, is non-existent" (Slip op, at 20). Nonetheless, the court found constitutional error in that "The only way Marsh (Respondent) can challenge what happened in the car on the way to the robbery is to cross-examine Williams to corroborate her story, undermine his credibility or further set before the jury the circumstances under which the discussion of the killings took place" (Slip op at 20).

In finding constitutional error, the court noted that its opinion was contrary to that of at least five other circuits, as "Five other circuits have expressed a preference of varying degrees for a standard in which the inculpatory value of a statement is measured by reference to the statement alone" (Slip op at 20, see footnote 9 in the opinion of the court, Appendix B, for a detailing of the cases from other circuits). Further, the Fifth Circuit en banc, has, as observed by the panel in this case, flatly held that "when a codefendant's extrajudicial statement does not directly implicate the defendant...the Bruton rule does not come into play....evidentiary linkage or contextual implication may not be utilized to convert a non-Bruton admissible statement into a Bruton inadmissible statement" (Slip op at 19). United States v Belle, 593 F 2d 487 (CA

3, 1979). On the other hand, the panel found support for its position in the Seventh Circuit in the case of English v United States, 620 F 2d 150 (CA 7, 1980).

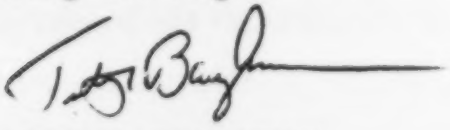
For the reason that there is a split among the federal circuits, involving at least seven circuits, with shades of difference involved even among the agreeing circuits, plenary review by this Court is required to resolve this issue.

CONCLUSION

For the reasons stated above Petitioner submits that plenary review should be granted.

Respectfully submitted,

JOHN D. O'HAIR
Prosecuting Attorney
County of Wayne



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Dated: February 7, 1986
TAB/jnd

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CLARISSA MARSH,

Petitioner,

CIVIL ACTION #83-CV-2665-DT

GLORIA RICHARDSON

Respondent.
_____/

MEMORANDUM OPINION AND ORDER

Petioner, a prisoner at the Huron Valley Women's Facility at Ypsilanti, Michigan, has filed a petition for writ of habeas corpus pursuant to 28 U.S.C. Sec. 2254. On April 23, 1979, she was convicted after a jury trial of two counts of felony murder in the perpetration of an armed robbery, M.C.L. 750.316; M.S.A. 28.548, and one count of assault with intent to commit murder, M.C.L. 750.83; M.S.A. 28.278.

Subsequently, Recorder's Court Judge Edward Thomas sentenced her to two concurrent life sentences concurrent to a term of sixty to ninety years imprisonment. On December 17, 1980, the Michigan Court of Appeals affirmed. (Docket No. 45451). Subsequently, the Michigan Supreme Court denied leave to appeal. 412 Mich. 927 (1982).

The evidence at trial showed that on October 30, 1978, co-defendants Benjamin Williams and Petitioner entered a home in Detroit with a Kareem Martin. By the time they left, Martin had shot the three occupants. Cynthia Knighton survived but her four-year old son, Koran Knighton, and her aunt, Ollie Scott, both died.

A

Petitioner first argues that her confrontation rights under Bruton v United States, 391 U.S. 123 (1968), were violated when codefendant Williams' confession was entered at their joint trial even though Williams never testified. Bruton held that a defendant's confrontation rights are violated when, even though a limiting instruction is given, a nontestifying codefendant's confession directly implicating the defendant is admitted into evidence at the joint trial. In the present case, Williams' actual and complete confession directly implicated Petitioner. However, the redacted confession entered into evidence neither mentioned Petitioner by name nor inculpated anyone else other than Martin. The trial judge twice instructed the jury

not to consider the confession as evidence against Petitioner.

Petitioner argues, however, that when considered with other evidence at the trial, the confession directly implicated her. She testified at trial that she was merely present at the scene when the robbery occurred. She claimed that she did not know ahead of time that either the robbery or the murders would happen. However, she did testify that she had left her home with Martin and later on picked up Williams. Once Martin and she entered Knighton's aunt's house, Martin pulled a gun. Petitioner then allowed Williams into the house. Williams was also carrying a gun. Petitioner also testified that she left the house before the shootings. On the other hand, Williams' redacted confession showed that both he and Martin (but not Petitioner) discussed the robbery in the car on the

way to the house and left in the car after the shootings.

In effect, Petitioner is arguing "contextual implication." She claims that, after viewing the other evidence presented at the trial (especially her own testimony), the confession necessarily implicates her as well. However, this argument has been rejected in this Circuit. United States v. Hendrickson, 542 F. 2d 21 (6th Cir. 1976); United States v. Dady, 536 F.2d 675, 678 (6th Cir. 1976). As stated in United States v. Belle, 593 F2d 487, 493 (3rd Cir. 1979), cert. denied, 442 U.S. 911 (1979), "evidentiary linkage or contextual implication may not be utilized to convert a non-Bruton admissible statement into a Bruton inadmissible statement." Other cases making this ruling include United States v. Wingate, 520 F.2d 309 (2d Cir. 1975),

United States v. Stewart, 579 F.2d 356 (5th Cir. 1978), cert. denied, 439 U.S. 936 (1978), United States v. Holleman, 575 F.2d 139 (7th Cir. 1978), United States v. Mulligan, 488 F.2d 732 (9th Cir. 1973), cert. denied. 418 U.S. 930 (1974), and Commonwealth v. Rawls, 276 Pa. Super. 89, 419 A.2d 109 (1980), appeal dismissed, 499 Pa. 267, 452 A.2d 1347 (1982).

Bruton deals with a statement that by itself powerfully incrimates the criminal defendant. Belle, 593 F.2d at 493. In the present case, the confession did not by itself implicate Petitioner at all. Therefore, this case is not controlled by Lyle v. Koehler, 720 F.2d 426 (6th Cir. 1983), in which the Sixth Circuit concluded that it was obvious from the statement itself that the defendant was implicated because Lyle was specifically referred to by his nickname in some

letters that the codefendant had written. Dady was distinguished because in that case the statements introduced as evidence did not refer to anyone else. Id., at 434, n.14.

B

Petitioner next argues that the evidence against her was insufficient to convict her of assault with intent to commit murder. When considering such a claim, the habeas court must view the evidence in the light most favorable to the prosecution and determine whether any rational finder of fact could have found guilt beyond a reasonable doubt on each element. Jackson v. Virginia, 443 U.S. 307, 319 (1979). In Michigan, assault with intent to commit murder requires (1) an assault, (2) with the specific intent to murder, and (3) if the assault had

been successful, a murder would have resulted. People v. Scott, 6 Mich. 287, 290 (1859); People v. Branner, 53 Mich. Ap. 541, 220 NW2d 183 (1974), lv. denied, 396 Mich. 814 (1974).

The undisputed evidence at trial showed that Martin fired all of the shots. Although the shootings occurred in the basement, no evidence was adduced that Petitioner went into the basement. Moreover, the prosecution presented no evidence that Petitioner had the specific intent to kill.

On the other hand, a person is guilty of an offense as an aider and abettor in Michigan if he performed an act that aided the crime either with the specific intent to aid the crime or with the knowledge that the principal had the appropriate required intent. People v. Turner, 120 Mich. App. 23, 27, 328 NW2d 5

(1982), lv. denied, 417 Mich. 1064 (1983). A jury may infer such intent from the facts in the evidence. People v. Eisenberg, 72 Mich. App. 106, 249 NW2d 313 (1976), lv. denied, 401 Mich. 803 (1977). This Court agrees with the Michigan Court of Appeals that the evidence was legally sufficient beyond a reasonable doubt:

> Marsh's case presents a much closer question on this issue than does Williams'. There was no testimony indicating she harbored an intent to murder Knighton, nor was there any showing that she heard Martin's statements regarding the need to "hurt" or "take out" the victims. There was, in addition, no testimony placing her in the basement, the scene of the shootings. The evidence does indicate, viewed in the light most favorable to the prosecution, that she was aware that Williams and Martin were armed, that she served as a guard or a "look out" at the door, that she prevented an attempted escape by Knighton, and that she was given the paper bag thought to contain the proceeds of a robbery. The evidence also indicates that Marsh knew Scott, supporting the inference that it was Marsh who allowed Martin to gain entrance. While it is a close

> question, we believe the evidence presented at the time of the motion was sufficient to survive a motion for a directed verdict....Marsh knew that both Williams and Martin were armed. She helped them to gain entrance, served as a look out, and prevented Knighton from escaping. From these facts, along with the other facts and circumstances adduced prior to the motion, the jury might infer that Marsh also knew that Martin had the specific intent to murder Knighton.

(Michigan Court of Appeals Opinion, pp. 4-5).

C

Petitioner last argues that the evidence was insufficient to convict for felony murder. At the time of the murders, according to Michigan law, felony murder in the perpetration of an armed robbery required that an armed robbery occur and that the death occurred in the perpetration of the armed robbery. The intent to commit the underlying felony was sufficient mens rea for murder. People v. Aaron, 409 Mich. 672, 717, 299 NW2d 304 (1980). A defendant

could be convicted of felony murder even if he did not do the killing. Instead, the death needed only to result from the perpetration or attempted perpetration of the felony. People v. Smith, 56 Mich. App. 560, 567, 224 NW2d 676 (1974). Each participant was accountable for any death if the death came from the affray and not from an independent intervening cause. People v Podolski, 332 Mich. 508, 52 NW2d 201 (1952), cert. denied, 344 U.S. 845 (1952).

After reviewing the evidence presented in this case, this Court believes that the evidence was sufficient to convict Petitioner of felony murder beyond a reasonable doubt. In its opinion, the Michigan Court of Appeals stated the following:

> Knighton testified that when Marsh and Martin entered the house Martin pulled out a gun. Williams was admitted shortly thereafter by

> Marsh, and he also had a gun. When Williams entered the house, he asked "Where's the money?" Martin took Scott upstairs and was soon joined by Williams. Knighton then heard the sound of drawers and doors being opened and closed. When the trio came back downstairs, Marsh was given a paper bag with something in it. Officer Porter testified that two of the upstairs bedrooms had been ransacked. While he also testified that he found a box upstairs containing money and savings bonds, we believe the evidence was sufficient. Additional evidence of Marsh's participation in the robbery was established through testimony that she appeared to be standing guard by the door, opening the door for Williams, and through testimony that she blocked Knighton's attempted escape from the house.

(Michigan Court of Appeals Opinion, pp. 3-4). Furthermore, the evidence clearly shows that the deaths occurred as a result of the armed robbery. Martin took the victims into the basement during the armed robbery and shot them. The evidence need not rule out every hypothesis other than guilt beyond a reasonable doubt. Jackson, 443 U.S. at 326.

Accordingly, IT IS ORDERED that the petition for writ of habeas corpus be and the same is hereby DENIED.

_____

RALPH B. GUY, JR.
UNITED STATES DISTRICT JUDGE

DATED: _____

APPENDIX B

NO. 84-1777

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CLARISSA MARSH,
Petitioner-Appellant,

v.

GLORIA RICHARDSON,
Respondent-Appellee.

On Appeal from the United States District Court for the Eastern District of Michigan.

Decided and Filed January 23, 1986

Before: MERRITT and CONTIE, Circuit Court Judges; and CELEBREZZE, Senior Circuit Judge.

CONTIE, Circuit Judge. Clarissa Marsh appeals from an order of the district court denying her petition for a writ of habeas corpus in which she alleged that her convictions for felony murder and assault with intent to murder were not supported by sufficient evidence and that

introduction of the statement of her non-testifying co-defendant violated her right of confrontation guaranteed by the Sixth Amendment. Finding that the convictions were obtained in violation of the Constitution, we reverse the judgment of the district court and remand with instructions to grant the writ.[1]

I.

Petitioner Marsh was tried jointly with her co-defendant Benjamin Williams pursuant to an information charging her with the felony murder of Ollie Scott and Koran Knighton in the perpetration of a robbery pursuant to Mich. Comp. Laws Ann. Sec. 750.316 and with assault of Cynthia Knighton with intent to murder pursuant to Mich. Comp. Laws Ann. Sec. 750.83.

Cynthia Knighton testified that on October 29, 1978, she went with her son

to the house of her aunt, Ollie Scott. Knighton was upstairs with her son when she heard voices downstairs, and came downstairs and saw Martin, Marsh's boyfriend, and Marsh. Scott introduced Knighton to Marsh, they all sat down and conversed, and Marsh said she had come to pick something up. Martin pulled out a gun, pointed it at them, and said "someone had gotten killed and that my aunt knew something about it." Marsh said something similar, and walked over to the front door. Martin grabbed Scott, and Marsh looked out the peephole. The doorbell rang and Marsh let in defendant Williams, holding a handgun. Williams said "I'm so-and-so's brother," and "[w]here's the money?" Martin took Scott upstairs, and Williams walked through the lower level of the house, at which time Knighton attempted to flee through the front door. Marsh grabbed her and held her until Williams returned, whereupon he

told the Knightons to lay on the floor. Williams went upstairs and Marsh refused to give Knighton a drink of water, but looked out the peephole. When the three came downstairs, Martin gave Marsh a paper grocery bag. Martin took Scott to the basement and Williams took the Knightons into the basement. Williams said "Hurry up and tie them up," and Martin said "We're going to have to hurt them." Knighton heard two shots. Then Martin, holding a blanket in front of his gun, shot Knighton three times. Thereafter, she telephoned the police.

Defendant Marsh objected at trial to the introduction of Williams' statement to the police even after the references to Marsh had been deleted: "[T]here are certain inferences that are raised by this statement even in its altered form that would tend to incriminate my client." The court overruled

petitioner's objection and allowed introduction of Williams' statement as follows:

> On Sunday evening, October the 29th, 1978, at about 6:30 p.m., I was over to my girl friend's house at 237 Moss, Highland Park, when I received a phone call from a friend of mine named Kareem Martin. he said he had been looking for me and James Coleman, who I call Tom. He asked me if I wanted to go on a robbery with him. I said okay. Then he said he'd be by and pick me up. About 15 or 20 minutes later Kareem came by in his black Monte Carlo car. I got in the car and Kareem told me he was going to stick up this crib, told me the place was a numbers house. Kareem said there would be over $5,000 or $10,000 in the place. Kareem said he would have to take them out after the robbery. Kareem had a big silver gun. He gave me a long barrelled .22 revolver. We then drove over to this house and parked the car across the big street near the house. The plan was that I would wait in the car in front of the house and then I would move the car down across the big street because he didn't want anybody to see the car. Okay, Kareem went up to the house and went inside. A couple of minutes later I moved the car and went up to the house. As I entered, Kareem and this older lady were in the diningroom, a little boy and another younger woman were sitting on the couch in the front

room. I pulled my pistol and told the younger woman and the little boy to lay on the floor. Kareem took the older lady upstairs. He had a pistol, also. I stayed downstairs with the two people on the floor. After Kareem took the lady upstairs I went upstairs and the lady was laying on the bed in the room to the left as you get up the stairs. The lady had already given us two bags full of money before we even got upstairs. Kareem had thought she had more money and that's why we had went upstairs. Me and Kareem started searching the rooms but I didn't find any money. I came downstairs and then Kareem came down with the lady. I said, "Let's go, let's go." Kareem said no. Kareem then took the two ladies and little boy down the basement and that's when I left to go to the car. I went to the car and got in the back seat. A couple minutes later Kareem came to the car and said he thinks that the girl was still living because she was still moving and he didn't have any more bullets. He asked me how come I didn't go down the basement and I said I wasn't doing no shit like that. He then dropped me back off at my girl's house in Highland Park and I was supposed to get together with him today, get my share of the robbery after he had counted the money. That's all.

(Emphasis added). The court delivered the following instruction to the jury.

> The statement of co-defendant Williams has been admitted into evidence against him only. I caution you that it may be used in considering only the guilt or innocence of Defendant Benjamin Williams. Under the rules already given to you, it must not be used or considered in any way against Defendant Clarissa Marsh.

Marsh testified that she met Martin in 1977 and had a relationship with him. Marsh testified that she often borrowed money so that Martin could purchase drugs. Martin lived in Marsh's house and refused to leave at her direction. Martin physically abused Marsh and in June 1978 she was hospitalized following a suicide attempt. Marsh worked with and borrowed moneey from Ollie Scott in the summer of 1978.

On October 29, 1978, Marsh lost her wallet with Martin's drug money at Eastland Shopping Center. Martin was upset and suggested that Marsh borrow

money from Scott. After dropping her children off at a Halloween party, Marsh and Martin picked up Williams. Petitioner stated that during the drive to Scott's house, she heard no conversation about a robbery. Martin and Marsh went to Scott's house where Marsh asked for a loan. Martin pulled a gun out and Marsh walked over to the door. Marsh testified that she looked out the door to see where the car was, that she did not feel free to leave, and that she opened the door to let Williams in. Marsh testified that she did not try to escape because she was scared and Marsh admitted that she blocked Knighton's attempt to escape but does not know why or what happened. Martin came downstairs and handed Marsh a bag. Marsh testified that she never heard anything said about anyone being hurt, shot or killed. After Martin, Williams and the victims went into the basement. Marsh left the house

without the bag. Marsh testified that she never intended to rob or kill anyone, and that she did not know that anyone was armed.

In closing argument, the prosecutor noted:

> [T]he same law that applies to Mr. Williams applies to Clarissa Marsh as well. The People must prove the same elements that I talked about in my discussion about Mr. Williams. Her guilt, of course, is to be determined separately from the evidence but you may consider the same evidence that you heard from the witness stand. The only thing that the Court will instruct you that you cannot consider is that statement that was made by the Defendant Williams. You cannot consider that statement when you determine her guilt or innocence. To do so would be unfair.

Further,

> [i]t's important in light of her testimony when she says Kareem drives over to Benjamin Williams' home and picks him up to go over. What's the thing that she says?" "Well, I'm sitting in the back seat of the car." "Did you hear any conversation that was going on in the front seat between Kareem and Mr. Williams?" "No, couldn't hear

> any conversation. The radio was too loud." I asked you whether that is reasonable. Why did she say that? Why did she say she couldn't hear any conversation? She said, "I know they were having conversation but I couldn't hear it because of the radio." **Because if she admits that she heard the conversation and she admits to the plan, she's guilty of at least armed robbery.** So she can't tell you that. How else do you know that she planned the robbery and was guilty of First Degree Felony Murder as well as the robbery?

(Emphasis added). Further, "Clarissa Marsh was in the planning stages of the robbery." Defense counsel argued that "[y]ou never heard anything about anyone saying anything in her presence about hurting anyone." In its instructions to the jury, the court repeated its instruction limiting the admissibility of the Williams statement.

On April 23, 1979, Williams and Marsh were convicted on all counts. On May 2, Marsh was sentenced to life imprisonment on the first and second counts and 60 to

90 years on the third count. On December 17, 1980, the Michigan Court of Appeals affirmed the convictions. The court held that the trial court had applied the wrong standard in assessing the motion for directed verdict, but that the evidence was sufficient to support the conviction under the correct standard. The court found that malice could be inferred from Marsh's admission of Williams, Marsh's holding of the grocery bag, Marsh's guarding of the door, and Marsh blocking Knighton's escape. The court stated:

> A split of opinion still exists on this Court over the issue of whether, in a felony-murder case, malice may be imputed from the underlying felony or merely inferred from the circumstances surrounding the killing, including the underlying felony....We believe **Fountain** presents the better view and hold that malice may not be imputed, as a matter of law, from the underlying felony. Accordingly, the evidence presented at the time of the motion had to sufficiently show that Williams acted with the intent to kill or in

> reckless disregard of a known and high degree of risk that death or serious bodily harm might occur.

(Footnote omitted). Further, "[t]he evidence indicated that Marsh knowingly participated in an armed robbery in reckless disregard of circumstances that indicated a high degree of risk that death or serious bodily harm could result." The court also rejected Marsh's Sixth Amendment argument. With respect to the assault charge, the court held:

> [T]he issue is whether the evidence was sufficient to show that Marsh aided and abetted the assult with the specific intent to murder Knighton or with the knowledge that Martin had this specific intent ....Marsh's case presents a much closer question on this issue than does Williams'. There was no testimony indicating she harbored an intent to murder Knighton, nor was there any showing that she heard Martin's statements regarding the need to "hurt" or "take out" the victims. There was, in addition, no testimony placing her in the basement, the scene of the shootings. The evidence does indicate, viewed in the light most favorable to the prosecution, that she was aware that Williams and Martin were armed, that she served

> as a guard or "lookout" at the door, that she prevented an attempted escape by Knighton, and that she was given the paper bag thought to contain the proceeds of a robbery. The evidence also indicates that Marsh knew Scott, supporting the inference that it was Marsh who allowed Martin to gain entrance. While it is a close question, we believe the evidence presented at the time of the motion was sufficient to survive a motion for directed verdict.

(Emphasis added). On February 5, 1982, the Michigan Supreme Court denied Marsh's application for leave to appeal, and, on April 30, denied her motion for reconsideration.

On July 6, 1983, Marsh filed her petition for a writ of habeas corpus contending that she was denied her right of confrontation when Williams' statement was read to the jury, and that she was denied due process by denial of her motion for directed verdict when the evidence was insufficient for conviction. On October 11, 1983, the district court denied the petition. The court rejected

Marsh's Bruton argument on the ground that Williams' statement did not implicate Marsh at all, and that it was improper to consider the other evidence introduced at trial to construe the statement as implicating Marsh. With respect to the sufficiency of the evidence the court adopted the reasoning of the Michigan Court of Appeals. On June 7, 1985, this court granted a certificate of probable cause and appointed counsel.

II.

The Sixth Amendment provides, in part, that "[i]n all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him." This guarantee is, of course, applicable to the states by reason of the due process clause of the Fourteenth

Amendment, **Harrington v. California**, 395 U.S. 250, 252 (1969); **Smith v Illinois**, 390 U.S. 129, 133 (1968); **Pointer v Texas**, 380 U.S. 400, 405 (1965), and is "'to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment,'" **Brookhart v Janis**, 384 U.S. 1, 10 (1964); **Smith v Illinois**, 390 U.S. at 133; **Pointer**, 380 U.S. at 406." '[T[he right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." **Pointer**, 380 U.S. at 405, **Barber v. Page**, 390 U.S. 719, 721 (1968).[2]

> The primary object of the constitutional provision in question was to prevent depositions or **ex parte** affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination

> of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Mattox v. United States, 156 U.S. 237, 242-43 (1895); **Ohio v Roberts**, 448 U.S. 56, 64 (1980); **Barber**, 390 U.S. at 721. "These means of testing accuracy are so important that the absence of proper confrontation at trial 'calls into question the ultimate "integrity of the fact-finding process."' "**Ohio v Roberts**, 448 U.S. at 64; **Tennessee v Street**, 105 S. Ct. 2078. 2082 (1985) (Confrontation Clause's mission is "to advance 'the accuracy of the truth-determining process in criminal trials.'")' **Chambers v Mississippi**, 410 U.S. 284, 295 (1973) ("The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional

right of confrontation and helps assure the 'accuracy of the truth-determining process.'). "[T]he Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose these infirmities through cross-examination, thereby calling to the attention of the fact-finder the reasons for giving scant weight to the witness' testimony." Delaware v Fensterer, 54 U.S.L.W. 3301, 3302 (November 5, 1985) (per curiam).

In Bruton v United States, 391 U.S. 123 (1968), the Court held that admission in a joint trial of the confession of Bruton's co-defendant Evans violated Bruton's Sixth Amendment right of cross-examination "because of the substantial risk that the jury despite instructions to the contrary, looked to the incriminating extrajudical statements in determining petitioner's [Bruton's]

guilt." 391 U.S. at 126. The Court recognized that no Confrontation Clause concern is implicated if the jury follows the court's admonishment to consider the extrajudicial statement only against its maker. Id. The Court noted that limiting instructions are effective in some situations. "Not every admission of inadmissible hearsay or other evidence can be considered to be reversible error unavoidable through limiting instructions; instances occur in almost every trial where inadmissible evidence creeps in, usually inadvertently." Id. at 135. However, the Court recognized that

> there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the

> jury system cannot be ignored....Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial. Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others. The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination.

Id. at 135-36 (footnote omitted).[3] Once it is determined that the limiting

instruction is ineffective, the extrajudicial statement is viewed as if it were introduced directly against the defendant. "[W]here the jury hears the co-defendant's confession implicating the defendant, the co-defendant becomes in substance, if not in form, a 'witness' against the defendant. The defendant must constitutionally have an opportunity to 'confront' such a witness. This the defendant cannot do if the co-defendant refuses to take the stand." Nelson v. O'Neil, 402 U.S. 622, 626 (1971).

Despite the Bruton holding, we recognize the strong presumption that jurors can follow the court's instructions. Tennessee v. Street, 105 S. Ct. at 2082 n.6 ("The assumption that jurors are able to follow the court's instructions fully applies when rights guaranteed by the Confrontation Clause are at issue.").[4] "The 'rule'-indeed,

the premise upon which the system of jury trials functions under the American judicial system - is that juries can be trusted to follow the trial court's instructions. Bruton was an exception to this rule, created because of the 'devastating' consequences that failure of the jury to disregard a codefendant's inculpatory confession could have to a nonconfessing defendant's case." Parker v. Randolph, 442 U.S. 62, 75 n.7 (1979).[5] However, "[t]he Confrontation Clause has never been held to bar the admission into evidence of every relevant extrajudical statement made by a nontestifying declarant simply because it in some way incriminates the defendant." Parker, 442 U.S. at 73.

Bruton, on its face, finds a Confrontation Clause violation where there is a "substantial risk" that the jury looked to the statements in question

in determining the petitioner's guilt. In Parker, the Court noted that "Bruton was tied to the situation in which it arose: 'where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial.'" 442 U.S. at 75 n.7. See Schneble v. Florida, 405 U.S. 427, 429-30 (11972). More recently the Court has cast the Bruton question as "whether, in light of the competing values at stake, we may rely on the '"crucial assumption"' that the jurors followed '"the instructions given them by the trial judge." '"Tennessee v. Street, 105 S. Ct. at 2082 (citations omitted). Accordingly, the critical factor in assessing an alleged Confrontation lause violation is the likelihood or probability that the jury will consider inadmissible evidence in assessing a

defendant's guilt. We appropriately require that such likelihood or risk of jury misconduct be "substantial" or more than a theoretical risk in light of the strong presumption of jury compliance with the court's instructions. In assessing whether such a substantial likelihood exists, the contested statement, its incriminatory nature, and its role in the case figure prominently.

None of our Circuit's precedents provide guidance respecting this precise factual situation. In United States v Dady, 536 F.2d 675 (6th Cir. 1976), the trial court admitted a statement by Dady's co-defendant Harrison, that he, Harrison, went to the bank with the intent to rob it. Dady argued that other evidence in the case demonstrated that Dady accompanied Harrison to the bank, and that, therefore, the jury could infer

that Dady had the same intent. We rejected this argument, holding that:

> If an inference arose that Dady and Ransom intended to rob the bank, it arose from the fact that independent evidence showed that they had accompanied Harrison to the bank, had discussed robbing the bank, and had dicussed obtaining guns for that purpose. None of this evidence came from the confession, but came directly from the testimony of Steele and Cross.

Id. at 678. We found that the inference that Dady had the requisite intent was likely to be drawn from the independent evidence, rather than from Harrison's confession, and that, therefore, there was no substantial likelihood that the jury would ignore its instructions.

In **Hodges v. Rose**, 570 F.2d 643, 646 (6th Cir.), cert. denied, 436 U.S. 909 (1978), we held that the extrajudicial statement must "clearly implicate" the defendant. We held further that the court may consider "other evidence" in

assessing the incriminatory effect of the statement, but that consideration of the weight of other evidence and the importance of the contested evidence to the prosecution is both improper and unnecessary. Id. at 647.[6] See generally United States v. Pickett, 746 F.2d 1129, 1133 (6th Cir. 1984), cert. denied, 105 S. Ct. 1222 (1985); Elliott v. Thompson, 599 F.2d 767, 769 (6th Cir.), cert denied, 444 U.S. 932 (1979); United States v Marks, 585 F.2d 164, 168 (6th Cir. 1978); Burkhart v. Lane, 574 F.2dd 346, 348 (6th Cir. 1978) (inquiry is whether "there is a 'substantial risk' that the jury used the statement in deciding [defendant's] guilt."). In Poole v Perini,, 659 F.2d 730, 733 (6th Cir. 1981), cert. denied, 455 U.S. 910 (1982), we reiterated that the "out-of-court statement must clearly implicate the defendant and create a substantial risk that the jury looked to

the incriminating extrajudicial statements in determining guilt."

In **Lyle v. Koehler**, 720 F.2d 426 (6th Cir. 1983), letters of a co-defendant, Kemp, referred to an individual named "Rock" and noted that Rock and Kemp had been arrested together. From other evidence in the case, the jury knew that Lyle was arrested with Kemp. Applying the standards enunciated in **Hodges**, we found a Sixth Amendment violation. "That the jury had to draw a short chain of inferences in order to link the letters and Lyle's participation in the crime does not dissuade us from concluding that the letters constituted a substantial portion of the state's evidence against him." 720 F.2d at 435. We distinguished Dady on the ground that, in that case, the extrajudicial statement included no mention of an individual who might be

construed as the defendant. Id. at 434 n.14.

Perhaps the most analogous case is United States v Gonzalez, 555 F.2d 308 (2d Cir. 1977), in which the co-defendant's statement indicated that a set of keys belonged to the person who gave him cocaine. An FBI agent testified that the keys fit Gonzalez's apartment, and the prosecution argued that linkage between the two statements. The court phrased a two-part exception to the Bruton exception to the rule that it is presumed that a jury will comply with its instructions. No substantial risk that the jury disregarded its instructions is deemed to exist "when the jury had to make a substantial inference to identify a co-defenant as the person mentioned in the out-of-court confession and when the evidence, even if incriminatory, could not have constituted a vital part of the

Government's case against the co-defendant." Id. at 316. The court concluded that other evidence against Gonzalez was only circumstantial and that the extrajudicial linkage was the only so-called "direct" evidence, and, therefore, violated Bruton. Similarly, in this case, the evidence of intent to kill or malice was entirely circumstantial with respect to Marsh with Williams' reference to the possibility of killing the robbery victims the only link between Marsh and knowledge that violence or death was a part of the robbery scheme.

In Clark v. Maggio, 737 F.2d 471 (5th Cir. 1984), cert. denied, 105 S. Ct. 1761 (1985), four police department employees testified that the defendants' (Clark and Benion) co-defendant, Mikell, told them that all three had formulated the idea for the robbery and that all three had

guns, although the witnesses never indicated who Mikell's compatriots were. The court found:

> This evidence, not duplicated by testimony from witnesses subject to cross-examination, directly implicated Midell's companions in the crime. Although no names were mentioned, the jury might well have filled in the blanks from the prior testimony that Mikell had provided the police with two names, deducing that those names were those of Midell's codefendants. Even if we assume the jury did not draw this inference of its own accord, the prosecutor, in his closing argument, supplied the names that the trial judge ordered omitted: "so consequently if Clark was with Mikell and Benion was with Clark, then they were all together. And if all three planned it, as Mikell said they did, then under the law of principals, all three of them are guilty of the crime...of first degree murder...."
>
> This conduct was not per se a violation of the confrontation clause, for the prosecution was not a witness against the accused. It was, however, grossly improper, for it constituted an effort by the prosecutor to supply information to the jury that was not only not in the record but had been ruled inadmissible.

Id. at 477-78 (footnote omitted). The court did not find reversible error, however, because the petitioner had not objected at trial and the error did not rise to the level of plain error. Clark, however, indicates that prosecutorial linkage of defendant and inadmissible evidence, as in this case, is persuasive in finding a Sixth Amendment violation.

The Seventh Circuit has likewise deemed it proper to look at the other evidence beyond the extrajudicial statement itself in assessing the statement's potential incriminatory impact. "The introduction of a confession from which the names of co-defendants have been excised may violate the Bruton rule if in context the statement is clearly inculpating of a codefendant, and vitally important to the Government's case." English v United States, 620 F.2d 150, 152 (7th Cir.),

cert denied, 449 U.S. 859 (1980) (emphasis added). It is the strength of the resulting inculpatory inference and not the fact that it had its genesis in both inadmissible and admissible evidence that determines whether the Sixth Amendment is violated. "Where the context may permit an inculpating inference, but does not compel it, no Bruton violation exists." Id. at 153. The court disapproved of the test or standard which measures the inculpatory value of the extrajudicial statement solely by reference to the statement itself.

> This test, however, insufficiently protects Bruton rights, which may be violated if as in Gonzalez the challenged statement in the context of other evidence directly and inevitably compels an inculpating inference. A Gonzalez type statement should satisfy the Bruton standard of a "powerfully incriminating extrajudicial statement," ...even though reference to other evidence is necessary.

Id. at 153 n.7. The court indicated a willingness to follow a version of the Second Circuit's test, rejected by this Circuit in Hodges, which, to find a Sixth Amendment violation, requires a showing that the extrajudicial statement is powerfully incriminatory and that the statement is vitally important to the govenment's case. In United States v Key, 725 F.2d 1123 (7th Cir. 1984), the court followed English in a case where co-defendant Baker testified that an 'accident' in issue had been staged, but never mentioned Key. It was uncontested that Key was involved in the accident. "Baker's admission that the accident was staged, then, was the equivalent of a statement that Key was lying. As such, it directly implicated Key." Id at 1126. See United States v DeStephano, 476 F.2d 324 (7th Cir. 1973). But see United States ex rel. Cole v. Lane, 752 F.2d 1210, 1216 (7th Cir. 1985) (citing United

States v Belle, 593 F.2d 487 (3d Cir.), cert. denied, 442 U.S. 911 (1979)); United States v. Madison, 689 F.2d 1300, 1309 (7th Cir. 1982), cert denied, 459 U.S. 1117 (1983).

Other circuits have generally disapproved of looking beyond the face of the contested extrajudicial statement in determining its incriminatory value, labeling such practice as contextual implication or evidentiary linkage. The strongest condemnation of such a practice is United States v. Belle, 593 F.2d 487 (3d Cir. 1979), by the en banc Third Circuit. In Belle, an FBI agent testified that Belle's co-defendant Munford said he was going to deliver heroin to a trash can near a Krispy Kreme Doughnut Shop between 8:00 and 8:30, that he had previously transported heroin into the area and had met with O'Neil Roberts on two occasions. Other evidence in the

case indicated that Belle had been arrested with Roberts. Belle argued that the jury could infer that the other heroin transactions referred to by Munford were with Roberts, and that Belle was involved in the transaction covered by the indictment because he had been arrested with Roberts. The court held that "[w]hen a codefendant's extrajudicial statement does not directly implicate the defendant, however, the Bruton rule does not come into play." 593 F.2d at 493. "It was in such a circumstance - where the challenged statement (and we emphasize, the statement only) directly implicated the complaining defendant Bruton - that the Supreme Court held that the codefendant's statement could not be admitted into evidence at a joint trial." Id. "In short, evidentiary linkage or contextual implication may not be utilized to convert a non-Bruton admissible statement

into a Bruton inadmissible statement." Id at 494.[7] As support for its conclusions the court noted that the "connecting testimony" was subject to cross-examination.[8] In this case, Marsh's own testimony connects her to the car ride in which the killings were allegedly discussed. The value of cross-examining herself, of course, is non-existent. The only way Marsh can challenge what happened in the car on the way to the robbery is to cross-examine Williams to corroborate her story, undermine his credibility or further set before the jury the circumstances under which the discussion of the killing took place. See also Rawls v. Patton, 585 F. Supp. 181, 185 (E.D. Pa. 1984). Five other circuits have expressed a preference of varying degrees for a standard in which the inculpatory value of a statement is measured by reference to the statement alone.[9]

We reject the approach which limits the appraisal of the inculpatory value of an extrajudicial statement to the face of the statement itself. Such an approach ignores the true incriminatory effect of the statement, and, with no countervailing benefit, sanctions the use of admittedly inadmissible evidence while ignoring the practical limitations inherent in the jury system as recognized by the Court in Bruton. Sanctioning the admission of an extrajudicial statement in circumstances in which a substantial risk exists that the statement will be used against the defendant not only denies the Sixth Amendment right to confrontation, but raises serious due process concerns regarding the validity of the conviction and the fundamental fairness of the trial process. It is no answer to this unfairness to say that the

evidence that set the stage was subject to cross-examination.

Circuit precedent provides that the determination of whether there exists a substantial risk that the jury might have considered Williams' statement "may require consideration of other evidence." **Hodges v. Rose**, 570 F.2d at 647. Examining all the circumstances in this case it is clear that the statement on its face did not incriminate Marsh, and that Marsh's testimony placing herself in the car where Williams' statement indicated that the robbery and murder were discussed provided the evidence that Marsh had prior knowledge of the plan. The court instructed the jury to consider Williams' statement only against Williams, not Marsh. The prosecution, however, in closing argument, questioned Marsh's testimony that she heard no discussion of the planned robbery and

suggested that, in fact, the robbery had been discussed in the car. Especially pertinent in this case is (1) that the prosecution in closing argument pointed out the impermissible linkage to the jury, (2) that the killings were discussed in the car, providing evidence of Marsh's knowledge of a plan encompassing murder, and (3) that intent or malice is a critical element of both offenses under Michigan law.[10]

There is no doubt that in the context of the evidence in this case, admission of the statement in the joint trial of Williams and Marsh was powerfully incriminating to Marsh with respect to the critical element of intent. The paucity of other evidence of intent and the prosecution's use of the Williams confession against Marsh created a substantial risk that the jury would consider Williams' statement in their

deliberations regarding Marsh's guilt. Accordingly, we conclude that Marsh's due process right to confrontation was violated by admission of the statement despite the limiting instruction.

Although we recognize that direct restrictions on the right of cross-examination are unconstitutional regardless of the absence of prejudice to the defendant, **United States v Bagley**, 105 S. Ct. 3375, 3381 (1985); **United States v Cronic**, 104 S. Ct. 2039, 2047 (1984) **Davis v Alaska**, 415 U.S. 308, 318 (1974); **Smith v Illinois**, 390 U.S. 129, 131 (1968); **Brookhart v. Janis**, 384 U.S. 1,3 (1966), it is clear that constitutional deprivations akin to that in **Bruton** are subject to harmless error analysis, **Brown v United States**, 411 U.S. 223, 231-32 (1973) ("We reject the notion that a **Bruton** error can never be harmless. '[A] defendant is entitled to

a fair trial but not a perfect one.' for there are no perfect trials."); Parker, 442 U.S. at 70-71; Schneble, 405 U.S. at 430 ("In some cases the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the codefendant's admission is so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper use of the admission was harmless error."); Harrington v. California, 395 U.S. 250 (1969).[11] We must make this determination "on the basis of 'our own reading of the record and on what seems to us to have been the probable impact...on the minds of an average jury.'" Schneble, 405 U.S. at 432 (quoting Harrington), but must not "indulge assumptions of irrational jury behavior when a perfectly rational explanation for the jury's verdict, completely consistent with the judge's instructions, stares us in the face," id.

at 432. Error is not harmless where "there is a reasonable possibility that the improperly admitted evidence contributed to the conviction," or where the jury would "have found the State's case significantly less persuasive," id. The improper admission of a co-defendant's uncross-examined statement is likely to be harmless where the statement is duplicative of other testimony in the case. Schneble, 405 U.S. at 431.

Under the facts of this case, we are unable to conclude beyond a reasonable doubt that the probable impact of Williams' statement and its use by the prosecution on the minds of an average jury can be deemed harmless. The statement was not merely cumulative nor was the independent evidence of guilt overwhelming. The linkage relied on by the State between Marsh's admission that

she accompanied Williams and Martin to the murder scene and Williams' statement that the possibility of killing the vitims was discussed in the car, contributed the most direct evidence of malice or intent on Marsh's part. the other evidence in the case was circumstantial and, although probative and perhaps persuasive, under the circumstances and in light of the elements of the offenses charged, we cannot say that introduction of Williams' statement did not render the State's case significantly more persuasive. Accordingly, in light of our conclusions that the convictions in this case were obtained in violation of the Constitution, and that such violations were not harmless beyond a reasonable doubt, we remand the case to the district court with instructions to grant the petition for a writ of habeas corpus.

Accordingly, the judgment of the district court is REVERSED and the case is REMANDED for proceedings consistent with this opinion.

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[1]Since we conclude that the convictions were obtained in violation of the Sixth Amendment, we need not address petitioner's contention that the insufficiency of the evidence violated due process.

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[2]**Chambers** v **Mississippi**, 410 U.S. 284, 294 (11973) ("The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due proccess."); **Bruton** v **United States**, 391 U.S. 123, 131 n.6 (1968) ("An important element of a fair trial is that a jury consider only relevant and competent evidence bearing on the issue of guilt or innocence.").

[3]The Court recognized that where a limiting instruction was insufficient, the alternatives of separate trials and redaction are possible. Id. at 134 & n.10("Where viable alternatives do exist, it is deceptive to rely on the pursuit of truth to defend a clearly harmful practice."). While

"[j]oint trials do conserve state funds, diminish inconvenience to witnesses and public authorities, and avoid delays in bringing those accused of crime to trial." id. at 134, "'[w]e secure greater speed, economy and convenience in the administration of the law at the price of fundamental principles of constitutional liberty. That price is too high.'" Id. at 135, quoting People v Fisher, 249 N.Y. 419, 432, 164 N.E. 336, 341 (Lehman, J., dissenting).

Whether Bruton applies in a non-jury trial is unclear. United States ex rel. Faulisi v. Pinkney, 611 F.2d 256, 258 (9th Cir. 1969), cert. denied, 397 U.S. 994 (1970). But see Nash v United States, 54 F.2d 1006, 1007 (2d Cir.), cert. denied, 285 U.S. 556 (1932) (the limiting instruction is a "recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody's else') (emphasis added) (see Bruton, 391 U.S. at 132 n.8).

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[4]Francis v. Franklin, 105 S. Ct. 1965, 1976 n.9 (1985) ("The Court presumes that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them").

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[5]The Parker plurality held that reversal based on Bruton was limited to situations in which "the implicated defendant has made no extrajudicial

admission of guilt." 442 U.S. at 74. Although Marsh described her participation in the scheme in this case, she admitted no guilt, and her testimony and Williams' statement do not "interlock" regarding the crucial facts relative to intent.

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[6] We held that:

> [A] trial court cannot decide on the admissibility of a statement under Bruton on the basis of the strength of the state's case. Rather, the court must decide whether the statement incriminates the defendant against whom it is inadmissible in such a way as to create a "substantial risk" that the jury will look to the statement in deciding on that defendant's guilt. Such an assessment may require consideration of other evidence in order to determine whether mere deletion of the defendant's name will be effective in making the statement non-incriminating as to him. But consideration of the weight of independent evidence is both improper and unnecessary to determination of the Bruton issue at the trial court level.

Id. at 647 (footnote omitted). Further,

> [a] judge can decide at the outset, however, whether a codefendant statement is likely to incriminate other defendants in such a way as to create a substantial risk that the jury will consider it in deciding on the guilt of those defendants. If the incriminating

> references ultimately add little to the government's case, then their exclusion does no harm, and the confrontation rights of the defendants are preserved. We do not read Bruton as guaranteeing a right of confrontation only as against testimony that proves to be vital to the prosecution's case. Contra, United States v. Gonzalez, 555 F.2d 308, 316-17 (2d Cir. 1977); United States v. Wingate, 520 F.2d 309, 313-14 (2d Cir. 1975).

Id. at n.9.

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[7] The court relied on the Second Circuit cases of United States v Wingate, 520 F.2d 309 (2d Cir. 1975), cert denied, 423 U.S. 1074 (1976) and United States ex rel. Nelson v Follette, 430 F.2d 1055 (ed Cir. 1970), cert. denied, 401 U.S. 917 (1971). In Wingate, the court applied the two-part powerfully incriminating/vitally important test and found that the extrajudicial statement in issue was not powerfully incriminating because "[o]nly when combined with considerable other evidence, which amply established Wingate's guilt, do the statements tend to implicate him." Id. at 314. In Nelson, the court likewise found no Bruton problem.

> [W]here the jury would have had to make a substantial inference to inculpate appellant on the basis of his codefendant's statements, an inference possible only because of other testimony independently subject to cross-examination, and

> where the information, even if possibly incriminatory of appellant, could not have constituted a vital part of the Government's case against him, we hold that the cautionary instructions given by the trial court were adequate to protect appellant's constitutional rights.

Id. at 1059. Obviously, neither of these cases support the strident blanket statements of Belle barring evidentiary linkage in all cases. Wingate and Nelson simply stand for the proposition that a statement is more likely to be powerfllly incriminatory the more directly it implicates the defendant and that where there is other substantial evidence from which the same fact might be inferred there is not substantial risk that the jury relied on the inadmissible evidence in reaching its verdict. The cases in no way bar linkage in every case.

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[8] The Court also cited the impracticalities of allowing linkage.

> If linkage evidence was subsumed by the Court in its Bruton ruling. It is apparent that such linkage evidence would be required to be subjected to judicial scrutiny together with the defendants' statements or confessions. No such suggestion is even intimated by Bruton, and it is understandable why it was not. To require what Belle seeks here would lead to the necessity for the Government to expose its entire case on a motion for severance. Indeed, whether or not a motion for severance is ever

> made, such a result would require the trial judge to examine under a microscope all the prosecution's evidence in order to determine whether any extrajudicial statement made by a nontestifying codefendant could be admitted as to that defendant, or whether it would have to be excluded because of the existence of independent "linkage" evidence which might connect another defendant to the statement. This result would necessarily lead to either a complete "mini-trial" before the judge, or to the practical prohibition of joint trials. See pages 493, 494 supra; United States v. Mulligan, supra. The federal rules do not contemplate such a practice, see Fed. R. Crim. P. 14; Bruton itself never suggested such an astonishing result; and no other court, to our knowledge, has construed Bruton in the unprecedented fashion urged upon us by Belle.

Id. at 495-96. We, of course, have little to add to the Supreme Court's rejection of a similar argument in Bruton. See note 3, supra; Bruton, 391 U.S. at 135.

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[9] See Serio v. United States, 401 F.2d 989 (D.C. Cir. 1968). The First Circuit has held that "[t]the fact that a codefendant's admission tended to corroborate the government's case...is simply not enough." United States v DiGregorio, 605 F.2d 1184, 1190 (ist Cir.), cert. denied, 444 U.S. 937 (1979). "[W]here the confession does not name a codefendant, it may be admitted ... solely against the confessor, and a

limiting instruction does serve to reduce any prejudicial inferences the jury might draw." Id. See United States v. Greenleaf, 692 F.2d 182, 189 (1st Cir. 1982), cert. denied, 103 S. Ct. 1522 (1983); United States v. Cleveland, 590 F.2dd 24, 27-28 (1st Cir. 1978). See also United States v. Porter, 764 F.2d 1 (1st Cir. 1985). The Second Circuit has recently held that "[a] defendant's Bruton rights would be violated, however, only if the statement, standing alone, would clearly inculpate him without introduction of further independent evidence." United States v. Wilinson, 754 F.2d 1427, 1435 (2d Cir.), cert. denied. 105 S. Ct. 3482 (1985); United States v. Burkee, 700 F.2d 70, 85 (2d Cir.), cert denied, 464 U.S. 8116 (1983); United States v. Slocum, 695 F.2d 650, 655 (2d Cir. 1982), cert. denied, 460 U.S. 1015 (11983) ("Where...the inculpatory impact upon the defendant of the statements is defused because it depends upon other prosecution evidence to connect the defendant to the subject of the statements, the Bruton rule is not violated."). See also United States v. Marin, 669 F.2d 73, 83 (2d Cir. 1982); United States v. Knuckles, 581 F.2d 305, 313 (2dd Cir.), cert. denied, 439 U.S. 986 (1978); United States ex rel. LaBelle v. Mancusi, 404 F.2d 690 (ed Cir. 1968). The Fifth Circuit has held that "the Bruton rule is not violated unless a codefendant's statement directly alludes to the complaining defendant.... This is true, even if the evidence makes it apparent that the defendant was implicated by some indirect references." United States v. Webster, 734 F.2d 1048, 1054 n.6 (5th Cir. 1984), cert. denied. 1-5 S. Ct.

2340 (1985); **United States v. Heffington**, 682 F.2d 1075, 1083 (5th Cir. 1982), **cert. denied**, 459 U.S. 1108 (1983); **United States v. Castro**, 596 F.2d 674, 677 (5th Cir.), **cert. denied**, 444 U.S. 963 (1979); **United States v. Stewart**. 579 F.2d 356, 359 (5th Cir.), **cert. denied**. 439 U.S. 936 (1978). The Ninth Circuit has likewise rejected evidentiary linkage. "Cases subsequent to **Bruton** have distinguished - as admissible - a codefendant's admission which is a vague reference from which guilt might be inferred from other facts and evidence....Although the statements admitted here did serve to tie Tavelman and Job to one another in the crime, they were not incriminating without reference to other, admissible evidence." **United States v. Tavelman**, 650 F.2d 1133, 1139 (9th Cir. 1981), **cert. denied**, 455 U.S. 939 (1982). **See United States v. Wright**, 742 F.2d 1215, 1223 (9th Cir. 1984). The Eleventh Circuit has held that "[f]or **Bruton** to apply, a codefendant's statement must be clearly inculpatory standing alone." **United States v. Satterfield**, 743 F.2d 827, 849 (11th Cir. 1984), **cert. denied**, 105 S. Ct. 2362 (1985). **See also United States v. Garrett**, 727 F.2d 1003, 1013 (11th Cir. 1984), **aff'd**. 105 S. Ct. 2407 (1985).

The Supreme Court has implicitly avoided the evidentiary linkage question. In **Schneble v. Florida**, 405 U.S. 427 (1972), the trial court admitted a statement by the co-defendant Snell indicating that petitioner Schneble had never left Snell alone in the car with the victim. Snell did not say that Schneble committed the crime.

However, Schneble claimed that he had left Snell alone in the car. Therefore, Snell's statement conflicted with Schneble's defense. While determining that any error was harmless, the Court noted:

> While Snell's statement fell far short of the type of comprehensive and detailed confession made by petitioner, it did tend to undermine petitioners initial (but later abandoned) claim that he had left Snell alone during the time at which the murder occurred. Snell's statement also placed petitioner in the position in the car from which the victim could more easily have been strangled. Thus, petitioner claims, the introduction of Snell's out-of-court statement, not subject to effective cross examination, deprived petitioner of his right of confrontation in violation of Bruton.

Id. at 429.

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[10] Mich. Comp. Laws Ann. Sec. 750.83 provides that "[a]ny person who shall assault another with intent to commit the crime of murder, shall be guilty of a felony...." Marsh was convicted as an aider and abettor in this case. "Assault with intent to murder is a specific intent crime.... The two elements of the offense which must be proven at trial consist of: (1) an assault; and (2) an intent by the defendant to murder the complainant at the time of the assault." People v. Marlin Smith, 119 Mich. App. 91, 93 (1982); People v. Branner, 53 Mich. App. 541 (1974).

"Positive proof of an intent to kill is not required, rather, there need only be evidence of an intent to kill or evidence from which an intent to kill may be inferred." People v Moore, 129 Mich. App. 354, 356 (1983). "[I]t is essential that the prosecution prove beyond a reasonable doubt that the defendant possessed specific intent or that he aided and abetted in the perpetration of the crime knowing that his coparticipants had the necessary specific intent... The requisite intent may properly be inferred by the jury from circumstantial evidence." People v. Sharp, 57 Mich. App. 624, 626 (1975); People v. Fields, 64 Mich. App. 166, 173-74 (1975); People v Poplar, 20 Mich. App. 132, 136 (1969).

Mich. Comp. Laws Ann. Sec 750.316 provides that "[a]ll murder which shall be ... shall be murder of the first degree." "[T]o constitute murder there must be (1) a homicide, (2) committed with malice, either express or implied." People v. Fountain, 71 Mich. App. 491, 499 (1976).

> Malice is not...imputed to an act of killing from the intent to commit an underlying felony. Although malice may be inferred from the nature of the underlying felony and the circumstances surrounding its commission, the presence or absence of malice in each case remains a question for jury determination.

Id. at 505-06.

[11] See also Fuson v. Jago, 773 F.2d 55, 61 (6th Cir. 1985); Pickett, 746 F.2d at 1133; Clark v. Maggio, 737 F.2d at 478 n.30 Lyle, 720 F.2d at 435; United States v. Ruff. 818 F.2d 855, 858 (3d Cir.), cer. denied, 464 U.S. 1051 (1984); Klein v. Harris, 667 F.2d 274, 290-91 (2d Cir. 1981) Mayes v. Sowders. 621 F.2d 850, 856 (6th Cir.), cert. denied, 449 U.S. 922 (1980); Elliott v. Thompson. 500 F.2d 767, 769 (6th Cir.), cert. denied, 444 U.S. 932 (1979); Marks 585 F.2d at 169; Burkhart, 574 F.2d at 349; Hodges v. Rose, 570 F.2d at 648.

EDITOR'S NOTE

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ORIGINAL

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NO. 85-1433

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

GLORIA RICHARDSON

Petitioner,

v.

CLARISSA MARSH

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

STATE APPELLATE DEFENDER OFFICE

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MOTION FOR LEAVE TO PROCEED
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The Respondent, CLARISSA MARSH, asks leave to file the attached Brief in Opposition to Petition for Writ of Certiorari without prepayment of costs and to proceed in forma pauperis pursuant to Supreme Court Rule 46.

Respondent states as follows in support of this motion:

1. The United States District Court for the Eastern District of Michigan granted Respondent leave to proceed in forma pauperis on July 6, 1983.

2. On November 19, 1984, the District Court denied a certificate of probable cause, but granted Respondent leave to proceed in forma pauperis on appeal.

3. On June 7, 1985, the United States Court of Appeals for the Sixth Circuit appointed counsel to represent Respondent, pursuant to the Criminal Justice Act of 1964, as amended.

4. In view of the foregoing, Respondent has not filed an affidavit with this motion. Supreme Court Rule 46.1; 18 U.S.C. § 3006(A)(d)(6).

WHEREFORE, Respondent asks this Honorable Court for leave to proceed in forma pauperis.

Respectfully submitted,

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Dated: March 21, 1986

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GLORIA RICHARDSON

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CLARISSA MARSH

Respondent.

PROOF OF SERVICE

I, the undersigned, hereby certify under penalty of perjury that a copy of Motion for Leave to Proceed in Forma Pauperis and Brief in Opposition to Petition for Writ of Certiorari and Appearance has been served on:

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525 W. Ottawa
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Lansing, Michigan 48913

Wayne County Prosecutor
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Detroit, Michigan 48226

by placing said documents in a properly addressed envelope with postage prepaid and placing said envelope in the United States mail box located at the State of Michgan Plaza, on this 21st day of March, 1986.

Kathy Myles

Kathy Myles

Subscribed and sworn to before
me this 21st day of March, 1986.

Joanne M. Morandini

Notary Public, Wayne County, Mich.
My commission expires: May 3, 1988

NO. 85-1433

IN THE

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BRIEF IN OPPOSITION TO PETITION
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Dated: March 21, 1986

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Marsh, Clarissa

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COUNTERSTATEMENT OF THE CASE

For purposes of this brief, Respondent accepts the Statement of the Case in Petitioner's petition for writ of certiorari, and relies as well on the facts set forth in the opinion of the Sixth Circuit Court of Appeals.

REASONS FOR DENYING THE WRIT

THE SIXTH CIRCUIT'S HOLDING THAT RESPONDENT WAS DENIED HER RIGHT OF CONFRONTATION BY THE ADMISSION OF A NONTESTIFYING CODEFENDANT'S STATEMENT AT THEIR JOINT TRIAL WAS BASED ON THE CORRECT APPLICATION OF BRUTON V UNITED STATES TO THE FACTS OF THIS CASE, AND ANY CONFLICTS WITH OTHER FEDERAL CIRCUITS ARE BASED ON FACTUAL, NOT LEGAL DIFFERENCES.

The Sixth Circuit Court of Appeals in this case ordered that Respondent Clarissa Marsh be granted a writ of habeas corpus because of the admission at trial of a codefendant's statement, which, although references to Respondent were removed, nevertheless added substantial, perhaps critical weight to the prosecutor's case in a form not subject to cross-examination. Bruton v. United States, 291 U.S. 123; 20 L.Ed.2d 476; 88 S.Ct. 1620 (1968). The Sixth Circuit found that under the facts of this case, the erroneous admission of codefendant Williams' statement was not harmless beyond a reasonable doubt:

> "Under the facts of this case, we are unable to conclude beyond a reasonable doubt that the probable impact of Williams' statement and its use by the prosecution on the minds of an average jury can be deemed harmless." (Slip Opinion, p. 25)(emphasis added).

Briefly, the pertinent facts are as follows:[1/] Respondent Marsh and her codefendant, Benjamin Williams, were each charged with two counts of first-degree felony murder[2/] and one count of assault with intent to murder[3/] arising out of a shooting alleged to have occurred during the course of a robbery in a house in Detroit, Michigan. Respondent Marsh was present in the house during the robbery, but was not present when Williams and a subsequently tried defendant, Kareem Martin, took the victims into the basement to shoot them.

Respondent Marsh was tried under an aiding and abetting theory. Under Michigan law, her intent was a critical element of the charged offenses,[4/] and a major theme of the prosecutor's case was that the defendants had articulated a preconceived plan to "take out," or kill the robbery victims. The prosecutor

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1/ The facts cited in this brief are those referred to in the Sixth Circuit's opinion.

2/ Mich. Comp. Laws Ann. § 750.316.

3/ Mich. Comp. Laws Ann. § 750.83.

4/ Marsh v. Richardson, slip opinion, p. 23, fn.10.

argued that they had discussed this plan in a car on the way to the house where the robbery occurred.

The only direct evidence of this preformulated plan was codefendant Williams' prior statement to the police.[5/] Williams himself did not testify. While references to Respondent Marsh were deleted, her own exculpatory testimony placed her in the car with Williams and Martin at the time they allegedly discussed the plan. Clarissa Marsh testified that she heard no discussion about robbing or killing anyone at this time, and denied seeing Martin produce a gun.[6/]

The Petitioner seeks a writ of certiorari, framing the issue as whether the rule of Bruton v. United States, supra, applies when the redacted statement of a codefendant incriminates a defendant only when viewed in the context of other, admissible evidence. Claiming there is a split among the federal circuits, Petitioner cites footnote nine of the Sixth Circuit's opinion in support of the petition.

Petitioner misconstrues the true nature of the Sixth Circuit's opinion in this case, as well as footnote nine. The critical questions under Bruton are whether, under the facts of a particular case, a codefendant's statement is "powerfully incriminating" or whether it adds "substantial, perhaps even critical weight to the government's case in a form not subject to cross-examination", and whether there was a "substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining (defendant's) guilt." 391 U.S. 123, 126-128. Within the context of those general rules, each case is of course judged according to its own peculiar facts, and while the absence of a direct reference to the defendant is a factor to be considered, it is not necessarily the decisive factor. Under the facts of the present case, the Sixth Circuit correctly found the codefendant's statement to be powerfully incriminating as to the respondent.

An examination of the cases cited in footnote nine shows that there is no

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5/ The redacted version of Williams' statement is at pp. 3-4 of the Sixth Circuit's slip opinion in this case.

6/ The Sixth Circuit in this case recognized that since Marsh's own testimony was exculpatory, the "interlocking confession" rule of Parker v. Randolph, 442 U.S. 62; 60 L.Ed.2d 713; 99 S.Ct. 2132 (1979), does not apply. Marsh v. Richardson, slip opinion, p. 12, fn. 5.

fundamental split as to the appropriate standard to apply in a Bruton analysis. The cases differ in the facts, not in the law.

For example, in United States v. DiGregorio, 605 F.2d 1184 (1st Cir., 1979), cert denied 444 U.S. 937; 100 S.Ct. 287; 62 L.Ed. 2d 197 (1979), the court considered the fact that the extrajudicial statement in question did not identify the defendant on its face. However, the court also noted that "there was substantial evidence independent of the extrajudicial statement to link Delvecchio to the conspiracy." 605 F.2d at 1190.

In United States v. Wilkinson, 754 F.2d 1427 (2d Cir, 1985), the Second Circuit rejected the defendant's Bruton argument where the extrajudicial statement, without additional independent evidence, did not link the defendant to the crime. However, the court also held that because of other substantial evidence of defendant's guilt, the statement was not powerfully incriminating:

> "Nor was the statement, in view of the wiretap evidence connecting Burch with the conspiracy, "a vitally important" part of the government's case against Burch, which is essential to a successful invocation of Bruton. United States v. Wingate, 520 F2d 309, 313 (2d Cir. 1975), cert denied, 423 US 1074, 96 SCt 858, 47 L.Ed.2d 84 (1976)." 754 F. 2d at 1435.

Had the Wilkinson court been faced with a situation such as the present case, where there was, apart from the codefendant's statement, only the most anemic circumstantial evidence on an element of the offense, they might well have reached a different result.

In fact, the Second Circuit, in United States ex rel. LaBelle v. Mancusi, 404 F.2d 690 (2d Cir., 1968), explicitly used "evidentiary linkage" to find Bruton error in a redacted statement which in no way inculpated the defendant on its face. The defendant and his brother were tried jointly for rape and murder. The brother, who did not testify, made a statement to the police which implicated the defendant in the crimes. All references to the defendant were removed, and the edited statement was read to the jury. The Court reversed the conviction based on the fact that independent evidence linked the defendant to the statement:

> "Thus the explicit reference to Eddie striking the death blow had been excised. But it was clear to the jury from the rest of the confession, and from the other evidence introduced at trial, that Richard and Eddie had been alone in their car with the Snay girl just before the death blow was struck. Thus the jurors had to conclude from the redacted confession that either Eddie or Richard, or both, committed the murder. The

> inculpatory nature of the confession as applied to Edward is not fairly subject to dispute." 404 F.2d at 692 (emphasis added).

In United States v. Hicks, 524 F.2d 1001 (5th Cir., 1975), the Fifth Circuit found no Bruton violation where the defendant's name was redacted from his codefendant's statement. While Hicks contains language intimating that an extrajudicial statement must directly implicate a defendant to come within the Bruton rule, the ultimate holding was based on the fact that the statement was simply not powerfully incriminating.

Significantly, the Fifth Circuit in Hicks relied on the Seventh Circuit's opinion in United States v. English, 501 F.2d 1254 (7th Cir., 1974), cert denied, Hubbard v. United States, 419 U.S. 1114; 95 S.Ct. 791; 42 L.Ed.2d 811 (1975). English noted Bruton's suggestion that redaction might in some cases cure the problem, but did not adopt a per se rule that a statement must be inculpatory on its face to come under Bruton. The Seventh Circuit has found Bruton error in cases where the challenged statement, standing alone, did not inculpate the defendant. See United States v. DeStefano, 476 F.2d 324 (7th Cir., 1973).

The Ninth Circuit in United States v. Tavelman, 650 F.2d 1133 (9th Cir., 1981), found no Bruton error where the codefendant's admission contained only a "vague reference" from which defendant's guilt could be inferred. 650 F.2d at 1139. The court found any Bruton error to be harmless in light of "the overwhelming admissible evidence that also tied the defendants to one another." Id.

Footnote nine of the Sixth Circuit's opinion in the present case also cites Serio v. United States, 401 F.2d 989 (D.C. Cir., 1968). However, the Serio court found Bruton error in a redacted statement which implicated the defendant only through linkage with other evidence:

> "Accordingly, under the principles of Bruton, the instruction to disregard the confession in considering Serio's case would not have avoided prejudicial error, due to the lack of opportunity to cross-examine LaShine coupled with the well-nigh inevitable association of Serio as the 'other man' referred to in LaShine's confession." Bruton v. United States, supra. 401 F.2d at 990.

The important point is that the question of whether a defendant has been denied the right of confrontation under Bruton v. United States, supra, and whether that denial is harmless beyond a reasonable doubt under Harrington v. California, 395 U.S. 250; 23 L.Ed.2d 284; 89 S.Ct. 1726 (1969), can only be determined in a case-by-case examination of all the facts and circumstances.

As the Sixth Circuit pointed out, the somewhat unusual facts of the case at bar support a particularly compelling argument for finding a Burton error which could not possibly be considered harmless:

> "The prosecution, however, in closing argument, questioned Marsh's testimony that she heard no discussion of the planned robbery and suggested that, in fact, the robbery had been discussed in the car. Especially pertinent in this case is (1) that the prosecution in closing argument pointed out the impermissible linkage to the jury, (2) that the killings were discussed in the car, providing evidence of Marsh's knowledge of a plan encompassing murder, and (3) that intent or malice is a critical element of both offenses under Michigan law." Slip Opinion, p.23

* * *

> "Under the facts of this case, we are unable to conclude beyond a reasonable doubt that the probable impact of Williams' statement and its use by the prosecution on the minds of an average jury can be deemed harmless. The statement was not merely cumulative nor was the independent evidence of guilt overwhelming. The linkage relied on by the State between Marsh's admission that she accompanied Williams and Martin to the murder scene and Williams' statement that the possibility of killing the victims was discussed in the car, contributed the most direct evidence of malice or intent on Marsh's part. The other evidence in the case was circumstantial and, although probative and perhaps persuasive, under the circumstances and in light of the elements of the offenses charged, we cannot say that introduction of Williams' statement did not render the State's case significantly more persuasive." Slip Opinion, p. 25-26.

The Sixth Circuit's opinion is in conformity with this Court's holdings in Bruton v. United States, supra, and Harrington v. California, supra, and does not significantly conflict with other federal circuits in its legal analysis. Any conflicts with the holdings of other circuits revolve around the facts, not the law.

Accordingly, this Court should deny the Petition for Writ of Certiorari.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the petition for a writ of certiorari.

Respectfully submitted,

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Dated: March 21, 1986

(3)

Supreme Court, U.S.
FILED
AUG 6 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1433

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1985

GLORIA RICHARDSON, WARDEN
Petitioner

vs.

CLARISSA MARSH
Respondent

ON WRIT OF CERTIORARI
TO THE SIXTH CIRCUIT COURT OF APPEALS

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED
FEBRUARY 24, 1986
CERTIORARI GRANTED JUNE 9, 1986

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DOCKET ENTRIES

1983

July 6: Motion by defendant/petitioner to proceed in forma pauperis, brief and affidavit in support, attachments, and proof of service.

July 6: order granting petition to proceed in forma pauperis

July 6: Petition for writ of habeas corpus, memorandum of law.

July 6: Order requiring filing of responsive pleading by 8/30/83.

July 13: Receipt for certified mailing as to defendant/Respondents Richardson and Kelly mailed 7/13/83.

July 19: Return for certified mailing as to defendant/Respondent Richardson executed on 7/18/83.

July 20: Return receipt executed on 7/14/83 as to Frank Kelly, attorney general.

July 25: Appearance of counsel on behalf of defendants.

July 25: Opposition by defendants to petition for writ of habeas corpus.

August 11: Notice of filing transcript and appellate briefs and proof of service.

August 11: Memorandum opinion and order that the petition for writ of habeas corpus be denied.

October 11: Judgment that Petition for writ of habeas corpus is denied.

DOCKET ENTRIES

October 25: Notice of Appeal by Clarissa Marsh.

1985

July 25: Appellant's Brief filed.

August 22: Appellee's Brief filed.

November 7: Oral argument held.

November 15: Petitioner's Supplemental Brief filed.

November 23: Respondent's Supplemental Brief filed.

1986

January 23: Opinion reversing the district court filed.

February 2: Motion for stay of mandate filed.

February 8: Answer to motion for stay of mandate filed.

February 25: Petition for Certiorari filed.

February 26: Motion for stay of mandate denied.

March 3: Mandate issued.

March 22: Opposition to Petition for Certiorari filed.

May 12: Conditional writ entered by district court.

June 9: Certiorari granted by United States Supreme Court.

PROSECUTOR'S OPENING STATEMENT

Recorder's Court
(97) Detroit, Michigan
Monday, April 16, 1979

MR. KRISCUINAS: Thank you, your Honor. Good afternoon, ladies and gentlemen of the (98) Jury. First of all, I would like to thank you for your attentiveness throughout the jury selection process. This is a very important case, not only to the Defendant but to the People of the State of Michigan. Your attention throughout the trial is very important. When you came into the courtroom today you knew absolutely nothing about this case. That's why you are an impartial juror and that's why you can sit on this case, because we want jurors to sit who know nothing about the case. The way you will

hear about the case is from the witness stand. Witnesses will tell you what happened. That way you don't have any prejudices or any preconceived notions about what happened. You will hear it from the witness stand the first time.

Now, talking about note-taking, I submit that if this was the kind of case that you needed to take notes, the Court would have told you that and he would have given you pencil and paper so that you could write it down. I'm sure that your collective memories will remember all of the details and all of the testimony, and if there's any problem in sorting out something, because sometimes people hear different things, and if you say, "Hey, I wrote it down on paper, so it must be right," you will get different opinions from different jurors as to how they heard something. So when you're in

the juryroom you can discuss the testimony and evidence collectively and decide among yourselves what the facts are.

Now, I submit that throughout the course of the (99) trial the attorneys will introduce relevant evidence, and based on that evidence you will be able to make your decision. Your job will be twofold. First of all, you will have to say whether or not Benjamin Williams and Clarisa Marsh were actually there at the place on Mendota. Once you decide that, your job then comes, if you decide from the evidence and are satisfied that they were there -- your job then becomes what are they guilty of. And that decision will come from the evidence. You have to decide what if anything they are guilty of.

The purpose of the opening statement is kind of to summarize the opening

statement for you, because we've endorsed some 15 to 20 witnesses -- probably not all of them will be called because they are not all really necessary, but there are some 15 to 20 witnesses who may testify. When you hear the testimony of the witnesses one at a time and I give you an opening statement to give you a picture of the case so that you can recognize the importance of each witness's testimony in making a complete picture of this trial.

I would like to start this case by reading again the Information. As the Court told you, it is not evidence. In fact, anything that I tell you is not evidence. Anything that the Defense Attorneys tell you is not evidence. The evidence comes solely from the witness stand. If there is something that I tell you that is not supported by the evidence, then don't take my word for it;

you are bound by what the witnesses say. (100) And the same thing goes for what the attorneys say. Your decision is made solely from the evidence.

Now, the evidence is a charging document and it does what its name says it does; it informs the Defendants of the charges against them. It charges that on October 29th, 1978, at 12627 Mendota in the city of Detroit, the Defendant Clarissa Marsh and the Defendant Benjamin Williams, while in the perpetration or attempted perpetration of a robbery, did kill and murder one Ollie Scott, contrary to the Michigan statutes.

It charges that at the same time and at the same location the Defendant Clarissa Marsh and the Defendant Benjamin Williams, while in the perpetration or attempted perpetration of a robbery, did kill and murder one Koran Knighton, contrary to the Michigan statute.

PROSECUTOR'S OPENING STATEMENT

Count III charges that in the same location and at the same time, the Defendant Clarissa Marsh, the Defendant Benjamin Williams, did assault Cynthia Knighton with intent to murder with a certain weapon, to-wit a handgun, contrary to the Michigan statute prohibiting that crime.

Now, the Defendants begin the trial with the presumption of innocence. The People have the burden of proof. Our burden of proof is to prove that the Defendants are guilty beyond a reasonable doubt. How do we do that? We do that with the testimony of the witnesses. Obviously, I wasn't there. If (101) I was there and I saw what happened I would have to be a witness in this case. So we do that through the testimony of the witnesses.

There is really only one key witness

for the People out of the 15 or 20 that are endorsed in this Information, and that is Cynthia Knighton, the Complainant in Count III. She's the key witness because on October 29th, 1978, she was at 12627 Mendota; she was there with her four-year-old son, Koran Knighton, visiting Ollie Scott, her aunt. She will testify that she went over there to visit on a Sunday; that it was not an unusual visit, and that while she was there visiting her aunt and she was upstairs washing her son's hands she heard some voices downstairs. You will hear her testify that the people who were downstairs, there was a man and a woman, and the woman that was there was Clarissa Marsh. She will testify that she came downstairs with her son and that her aunt, Ollie Scott, introduced Clarissa Marsh to her. She said something like Clarice or Clarissa, she wasn't sure of

the exact name at the time. She will tell you, as she told the police officers, she wasn't sure of the name. And she told them that Miss Marsh knew her aunt and her aunt knew Miss Marsh. She will testify that they had a conversation and that then Miss Marsh went into the livingroom and they discussed another aunt and they sat around talking for a period of time when the man pulled out a gun, and that man we're talking about, he's not in court today. (102) I told you that there were three people involved in this; he is not in court now. That man pulled out a gun and started talking about Mrs. Scott, saying, "You know something about so-and-so who was killed." The reason we don't know who the so-and-so is is because Miss Knighton doesn't remember the exact name; she wasn't familiar with the name that the man gave.

PROSECUTOR'S OPENING STATEMENT

She will testify that Mrs. Scott said, "I don't know anything at all about that," and that Miss Marsh then said, "Yes, you do. Don't you remember," or something to that effect. She will testify that when the man pulled out the gun Miss Marsh went to the front door and she stood by the front door. She will testify that the man was arguing about some shooting and there was -- the doorbell rang. And the man said, "Do you know who that is?" And Mrs. Scott said, "No, I don't know who it is." And that Miss Marsh opened the door for that man to come in. And that man was Benjamin Williams.

That Benjamin Williams came in and he had his hand over his mouth and he had a gun at his side and that eventually he dropped his hand from his face so that she was able to recognize him and to be able to identify him. She will tell you

that he too pulled out a gun and said, "I'm so-and-so's brother, you know about the killing. And I think that you will see eventually that this was all a ruse; that the real reason that the three people were there was to rob Mrs. Scott.

Now, you're going to hear some testimony perhaps (103) that Mrs. Scott was involved in numbers and she had some money and that's why that particular location was chosen.

You will hear the testimony that when Mr. Williams came into the house he had his gun out and he told Cynthia Knighton and her four-year-old son to lay on the floor in the livingroom. She will testify that the man took Mrs. Scott upstairs to the bedroom where there was a cash box. She will testify that the man -- that Mrs. Knighton remained downstairs. She will testify that Mr.

Williams went into the kitchen and was looking around in the kitchen. She will testify that at that point she got up with her child and tried to run for the door to get out of the house. And she will testify that Miss Marsh grabbed her on the arms and wouldn't let her open the door and that Mr. Williams came back with this gun and said, "Get back down on the floor." She then will tell you that Mr. Williams went upstairs also where Mrs. Scott was with the first man; that she heard a voice upstairs saying, "Where's the money? Give me more money." She will testify that she heard her aunt say, "You've got it all; I don't have any more money." She will testify that the three persons then came down, Mr. Williams, the other man and Mrs. Scott -- that they came downstairs and one of the two men handed Miss Marsh a bag and that Miss

Marsh stayed at that front door. you will hear the testimony that this man took Mrs. Scott downstairs into the basement and that after a short minute or so Mr. Williams told Cynthia Knighton (104) and her child to go downstairs in the basement, also. She will tell you that in the basement the man had her aunt laying down on the floor in the basement in one corner; that Mr. Williams followed Cynthia Knighton and her son downstairs and that she walked over to a corner not too far from where her aunt was. She will tell you that while she was there she knelt down on her knees and that she heard two shots from the area of where this other man was and where Mrs. Scott was.

You will then hear the testimony that the man then walked over to where Cynthia Knighton was, that he had some

type of a canvas or a blanket or something and that he held that up in front of her, perhaps so that the blood wouldn't squirt, or for some reason, and fired a total of some four shots -- I believe there were three shots -- that struck Cynthia Knighton. And I think it was one shot that struck Koran Knighton, her son.

She will testify that at the time this other man pulled the trigger Mr. Benjamin Williams was some six feet away with his gun out, also, standing in the same line of vision; that she was on her knees, that the other man was on his knees facing her holding up the canvas and that Mr. Williams was a short distance behind him watching everything with his gun out.

The Court is going to instruct you on the law that is to be applied in this

case. One important instruction that the Court will instruct you on is the law of aiding and abetting. A person who aids, assists or counsels another in the (105) commission of a crime, the Court will tell you, is just as guilty as the actual person that committed the crime. For instance, in an armed robbery case, if three people enter a house, one person has a gun, two people don't have guns, and all three people participate in an armed robbery of Officer Harris and I take his wallet at gunpoint or I hold a gun on officer Harris and two people go and they take his wallet out and then we all walk out and share the money, obviously we're equally guilty of armed robbery. I'm guilty of armed robbery because I have the gun, even though I didn't take anything physically from the man. The other two people are just as

guilty of armed robbery even though they didn't have handguns in their possession at the time, because they intended to rob the person, the victim.

How do you know a person's intent? The People's theory in this case is that the other man, Mr. Williams, and Miss Marsh, are all equally guilty, they are all equally responsible for the death of Ollie Scott and Koran Knighton, and they are all equally responsible for the shooting of Cynthia Knighton. And it's only because Cynthia Knighton is still alive, that she was not killed, that we are here today.

The key question for you, ladies and gentlemen of the Jury, is going to be whether or not these two Defendants intended to participate in that robbery and whether they participated in the murder. I think that that's really the

key (106) issue for you and that's the purpose of the attorneys in the case, who will help assist you in seeing what these issues are. There's only one person who can actually pull the trigger but all three can be guilty of First Degree Murder, and I'll tell you why; because they are all equally involved, they are all equally responsible; and the key is whether they intended to kill. How do you determine that? You'll see from the testimony; that they intended it.

The way that you look at intent is that people express their intent in two ways: They express it through words, "I'm going to kill you;" or they express it through their conduct, the way that they act. You don't have to say, "I'm going to kill you," If you pull a gun on a person and you pull the trigger and then you shoot that person, your conduct has explained it.

PROSECUTOR'S OPENING STATEMENT

I submit to you, ladies and gentlemen of the Jury, that the way the People will prove Clarissa Marsh and Benjamin Williams guilty is through their conduct. The fact that Miss Marsh was the lookout, that she stood by the door, that she let in Mr. Williams and that she remained upstairs and made sure that no one else came in and stopped their plans or discovered them; the fact that she kept Cynthia Knighton and Koran Knighton from escaping when they wanted to; the fact that she was known to Mrs. Smith because she was introduced by name; the fact that she would be able to be recognized by Cynthia Knighton (107) because she saw her as well as knew her name at that time; she had an interest in the death of all three of these people; she had an interest in the pulling of the trigger and the shooting of the bullets into all these people.

PROSECUTOR'S OPENING STATEMENT

As to Mr. Williams, he cooperated in the robbery. He also had his gun. He led Koran Knighton to his death down in the basement. He led Cynthia Knighton down the steps into the basement where she was shot. When Mr. Williams was arrested by the police he was photographed. You will hear testimony that the photographs were taken to the hospital where Cynthia Knighton was and that she picked out his photograph; that when he was first arrested he made a statement to the police and in that statement he said, "Hey, I don't know nothing about this crime. I don't know anything about it. I was over at a friend's house."

MR. HILL: I think we're entering an area, your Honor --

THE COURT: Mr. Kriscuinas?

MR. HILL: May we approach the bench, your Honor?

THE COURT: Yes.

(Side bar discussion.)

MR. KRISCUINAS: As I told you earlier, sometimes objections are made and you follow the instructions of the Court. I submit to you, ladies and gentlemen of the jury, that you will know the intent with which both Defendants acted. i submit that you will be satisfied beyond a reasonable doubt of their guilt (108) in the shootings. I submit that at the conclusion of the testimony, at the conclusion of the arguments, you will return a verdict of guilty of First Degree Murder in Count I against both Defendants, in Count II against both Defendants, and guilty of Assault With Intent to Murder in Count III.

Now, just to let you know what is going to happen today, you will hear the

testimony from the Assistant Wayne County Medical Examiner, who will testify that he performed autopsies on both bodies identified to him as Ollie Scott and Koran Knighton, and he will tell you that he determined the cause of death as to each individual to be gunshot wounds. He will testify about these autopsies.

In addition you will hear stipulations. A stipulation is an agreement between the parties that if a witness came in that is what he would testify to. We have a stipulation that if Raymond Scott were here today he would testify that he went to the Wayne County Morgue and he identified the bodies of Ollie Scott and Koran Knighton to the Assistant Wayne County Medical Examiner.

I ask you to pay close attention to all the testimony elicited here and to all the arguments, and I thank you for your attentiveness.

MOTION FOR SEVERANCE

Recorder's Court

(19) Detroit, Michigan

MR. WALKER: Yes, I have a couple of brief motions, your Honor.

First, I would like to renew my motion for severance in this case. I believe that given the authority of People v Hearst, found at 396 Michigan, page 1, and the language in that case which indicates, or gives indications, for separate trials, that this case is one that is contemplated by that case, and therefore I would renew the motion that has already been brought and argued in this case.

THE COURT: I believe that the Hearst Case was the one that you cited at the time that you argued your motion initially, is it not?

SEVERANCE

MR. WALKER: Yes, sir.

THE COURT: Mr. Hill?

MR. HILL: I would join my brother counsel in that motion, your Honor.

THE COURT: Based upon the previous statement of the Court, the motion for severance is denied, because the Court is not convinced as to the inconsistency of the defenses entered of the two defendants.

TESTIMONY OF CYNTHIA KNIGHTON

Recorder's Court
(155) Detroit, Michigan
April 18, 1979

A: Yes, I am.

Q: Where do you work?

A: Michigan Bell.

Q: What do you do at Michigan Bell?

A: Telephone operator.

Q: Are you still working there now?

A: Yes.

Q: I want to direct your attention back to October 19th, 1978, sometime around 6:30 in the evening, did you go to 12627 Mendota in the city of Detroit?

A: Yes.

Q: And whose home was that?

A: My aunt's.

Q: What was your aunt's name?

A: Ollie Scott.

TESTIMONY OF CYNTHIA KNIGHTON

Q: When you went there did you go there alone or did you go there with someone else?

A: No, I went with my son; that's all.

Q: And when you were there was anyone else there?

A: Yes.

Q: Who else was there?

A: My brother, my sister-in-law, a friend of theirs; that's all -- my aunt.

Q: Do you know what their names are, for the record.

A: Darryl Johnson, Jennifer Johnson, Craig Simpson.

(156)Q: You arrived at the home sometime around 6:30 in the evening and when you got there what did you do?

A: Talked and sat down and watched television.

TESTIMONY OF CYNTHIA KNIGHTON

Q: Did there come a time when you (sic) brother and the other people left?

A: Yes, they left.

Q: Approximately how long were they there while you were there?

A: About a half-hour.

Q: So sometime around seven o'clock?

A: Yes.

So when they left how many people were in the house altogether?

Three

Q: Yourself, Koran and Ollie Scott?

A: Yes.

Q: What's the next thing you did after your brother left?

A: Watched television for awhile and had something to drink, water, Koolaid.

Q: What's the next thing that happened after that?

A: After that we went upstairs to use the bathroom.

Q: By we, who do you mean?

A: My son and I.

Q: And when you were upstairs using the bathroom did you hear anything downstairs?

A: Yes, after a few minutes I did; voices.

(157)Q: You heard some voices?

A: Uh-huh.

Q: How long did you stay upstairs?

A: I'll say about five minutes.

Q: Did there come a time when you came downstairs?

A: Yes, I did.

TESTIMONY OF CYNTHIA KNIGHTON

Q: And what happened when you came downstairs? Did you come downstairs alone or with your son?

A: I came with my son.

Q: What happened when you came downstairs?

A: I saw some people talking to my aunt.

Q: How many people did you see?

A: Two.

Q: What were their sexes?

A: A man and a woman.

Q: Do you see that woman in court today?

A: Yes.

Q: Would you point her out, please.

A: Right there.

Q: What is she wearing, for the record?

A: Beige coat, black shoes.

TESTIMONY OF CYNTHIA KNIGHTON

MR. KRISCUINAS: Let the record indicate the witness has pointed to and identified the Defendant Clarissa Marsh.

Q: (By Mr. Kriscuinas) The man that was with Mrs. Marsh, do you see him in court today?

(158)A: No.

Q: When you came downstairs what if anything did your aunt do?

A: She introduced me to the woman.

Q: And how did she do that? What did your aunt say?

A: She said, "This is my niece Cynthia, and this is her son. And this is Clarissa, or Clarice."

Q: And when she introduced Miss Marsh to you, how did she do that?

A: She said to Miss Marsh that this is my niece Cynthia and

this is her son Koran. And she said this is Clarice, Clarissa.

Q: You say Clarice, Clarissa; are you sure of the name?

A: I wasn't quite sure of her name, you know.

Q: Did she introduce to you the man by name?

A: No.

Q: Now, when Miss Marsh -- where were you standing when the introductions took place?

A: I had went to sit down on the couch.

Q: You sat down on the couch?

A: Right.

Q: Was that in the livingroom?

A: In the livingroom, yes.

Q: How far was that from the area of the front door?

A: I'll say two feet, maybe.

Q: The couch is right next to the front door?

A: Yes.

(161)Q: By a picture of your aunt, was it a picture of Ollie Scott or a picture of somebody else?

A: No, another aunt.

Q: What was her name?

A: Frances.

Q: And there was some discussion about that photograph?

A: Right, that's what they were talking about.

Q: How long did this conversation take, the conversation in the livingroom?

A: Just a couple of minutes - couple of seconds.

Q: And during this couple of minutes or seconds did Miss Marsh ever leave the room?

A: No.

Q: She remained on the couch next to you?

A: Right.

Q: And did the other man leave the room at all?

A: No.

Q: He remained standing in the livingroom?

A: Well, he was sitting at first on the arm of a chair.

Q: What's the next thing that happened after you had that conversation -- after the conversation was had?

A: The woman said she just came over to pick up something from my aunt and she stood up.

Q: Did she indicate what she came to pick up?

A: I'm not sure what it was.

(162)Q: You're not sure what it was, but she stated there was something that she came over to pick up?

A: Right.

Q: What happened after she said that?

A: Well, then the man pulled -- well he pulled out the gun while we were looking at her, so when we looked back over at him he had pulled his gun out.

Q: When you looked at the man he already had his gun out?

A: Right.

Q: And how far was he from you when he pulled his gun out?

A: Two feet.

Q: What was he doing with the gun?

A: He was pointing it at us.

Q: By us, who do you mean by us?

A: Me, my aunt, my son.

Q: Your son Koran?

A: Right.

Q: When the man pulled out the gun what if anything did he say?

A: He didn't say anything.

Q: Did he ever say anything once the gun was out?

A: Yes, he did.

Q: What was it that he said?

A: He said someone had gotten killed and that my aunt knew something about it.

Q: After this was said what did your aunt say?

(163)A: She didn't say anything.

Q: What if anything did Miss Marsh say when the man said that about knowing somebody got killed?

A: She said something about my aunt was someplace where the man was supposed to be and that she knew something about it, too.

Q: Miss Marsh said that she knew something about it.

A: That my aunt did, yes.

Q: What's the next thing that happened after these words were spoken?

A: Well, when the man pulled the gun out the woman walked over to the front door.

Q: You're talking about Miss Marsh?

A: Miss Marsh, yes.

Q: She walked over to the front door?

A: By the door.

Q: And how far in terms of feet was that from where you were standing -- or how far did she walk?

A: About two feet.

Q: So she got up off the couch and walked over to the door?

A: Right.

TESTIMONY OF CYNTHIA KNIGHTON

Q: The area by the door where Miss Marsh was, was that area well lit?

A: Yes, there was a lamp right there.

Q: And when she stood by the door were you able to see her face?

(164) A: Yes.

Q: When the man pulled the gun out what was Miss Marsh's reaction?

A: She really didn't have any reaction. She just, you know, stood up and went over by the door.

Q: Did she say anything to the man about putting that gun away or anything like that?

A: No.

Q: After Miss Marsh went to the door did the man say anything else?

TESTIMONY OF CYNTHIA KNIGHTON

A: He had grabbed my aunt at that point and he was just holding her, you know.

Q: Did he say anything to your aunt at that time?

A: No.

Q: What was Miss Marsh doing by the door?

A: She looked out the peephole a couple of times.

Q: There was a peephole in the door?

A: Uh-huh.

Q: Did you ever see her leave the area at that time?

A: No.

Q: Did you ever see her try to get out the door?

A: No.

Q: You didn't see her try to run away or anything like that?

A: No.

TESTIMONY OF CYNTHIA KNIGHTON

Q: From where you were, were you close enough to hear the man (165) talk?

A: Yes.

Q: Did you ever hear the man say anything to Miss Marsh over by the door?

A: No.

Q: What's the next thing that happened?

A: The doorbell rang.

Q: What happened after that?

A: The man who was holding my aunt asked who was at the door and she said she didn't know.

Q: She said she didn't know?

A: She didn't know.

Q: What if anything did the man say then?

A: Then he asked her where was Frances; that's my other aunt

that stays there. And she says that she's out of town.

Q: What did Miss Marsh do next?

A: She looked out the peephole, you know, in the door, and she opened the door.

Q: When she opened the door did she let anyone in?

A: Yes.

Q: How many people came in?

A: One.

Q: Was that a man or a woman?

A: A man.

Q: Do you see that man in court today?

(166)A: Yes, I do.

Q: Would you point him out, please.

A: He has a red-flowered shirt on and gray pants.

TESTIMONY OF CYNTHIA KNIGHTON

MR. KRISCUINAS: Let the record indicate the witness has identified the Defendant Benjamin Williams.

Q: (By Mr. Kriscuinas) When Mr. Williams came in the house what if anything did he do?

A: He came in with his hand over his mouth.

Q: Would you show the Jury how he came in with his hand over his mouth.

A: Like this.

Q: Did you notice anything in his hands when he came in?

A: Yes, he had a gun, also.

Q: How was he holding the gun when he came in?

A: Down at his side.

Q: Can you describe what that gun looked like.

A: It was black and long.

Q: Long like a rifle?

A: It was a handgun but it was long --

Q: The gun that the other man had, the first man that came in, can you describe that gun for us.

A: Yes, it was a short, fat, shiny handgun.

Q: By shiny do you mean something like silver?

A: Yes.

Q: And when Mr. Williams came into the house what if anything (167) did he say?

A: He came in and said, "Yeah --" I forget the name, but he said, "Yeah, I'm so-and-so's brother."

Q: Was this the same so-and-so that the first man had talked about?

A: I suppose so, yes.

TESTIMONY OF CYNTHIA KNIGHTON

Q: Do you remember was it the same name? I know you don't remember the name --

A: Yes, it was the same name but I just don't remember --

Q: Now, after he came in did he say anything else?

A: He said, "Where's the money."

Q: Where was Miss Marsh when he said this?

A: Still standing by the door.

Q: Where did Mr. Williams go after he came in the door? Did he stand by the front door or did he move into the livingroom?

A: He went to the livingroom and to the diningroom and to the kitchen. Then he came back out.

Q: Miss Knighton, I would ask you to step down from the witness

stand and take a look at the blackboard that we have. I'll show you a sketch; do you recognize the layout of that sketch?

A: Uh-huh.

Q: Could you point on the sketch to the area where the front door is. Do you recognize that?

(168)A: Yes, over here.

Q: Do you see the front door?

A: Yes.

Q: Can you indicate where you were seated at, where the area of the couch was that you were seated at. Is that indicated on the map?

A: It's not here but it looks like it would be here. The re(sic) was a cocktail table here and

the couch was behind the table and two lamps right here.

Q: On this sketch it indicates a component stereo set; there was no stereo set there; is that what you're saying?

A: No.

Q: So this sketch is incorrect?

A: Yes.

Q: Okay. You were seated here and this is the front door; is that correct?

A: Yes.

Q: And this is the front door that Mr. Williams came through and this was the front door that Miss Marsh was standing by and you were seated on the couch right here; is that correct?

A: Yes.

Q: Now, Mr. Williams came into the house and he said, "Where's the

money?" What happened after that?

A: The man that was holding my aunt took her upstairs.

(169)Q: That would be the first man that came into the house?

A: The first man, yes; he took her upstairs.

Q: Do you know what's located upstairs?

A: Bedrooms, bathroom.

Q: And where were you when they went upstairs?

A: I was downstairs on the couch yet.

Q: You were still sitting on the couch?

A: Yes.

Q: And your son was still sitting on the couch?

A: Right.

TESTIMONY OF CYNTHIA KNIGHTON

Q: Where was Miss Marsh at this time when the man went upstairs?

A: Still at the door.

Q: And you say Mr. Williams walked through and went into the kitchen or something like that?

A: Yes, sir.

Q: What did you do when Mr. Williams went into the kitchen?

A: I tried to run out of the door with my son; I grabbed him and tried to run out of the door.

Q: Which door was this?

A: The front door.

Q: Is it the same door that Miss Marsh was by?

A: Right.

Q: What happened when you ran to the front door? Did you get out of the house?

A: No, she grabbed me.

TESTIMONY OF CYNTHIA KNIGHTON

(170) Q: Where did she grab you?

A: My shoulders.

Q: How did she grab you?

A:P She just grabbed me and held me, and I guess the other guy heard the noise and he ran back, you know, into the livingroom where we were.

Q: By the other guy, do you mean the guy that went upstairs?

A: No, Mr. Williams.

Q: He came from the kitchen out front?

A: Right.

Q: When she grabbed you did Miss Marsh say anything to you?

A: No.

Q: What if anything did Mr. Williams say when he came back?

A: He told us to get on the floor, lay on the floor.

TESTIMONY OF CYNTHIA KNIGHTON

Q: And where did you lay on the floor?

A: Between the couch and the table.

Q: On this sketch you're indicating right in this area?

A: Yes.

Q: You laid down with your son on the floor; is that correct?

A: Yes.

Q: And when you came up to Miss Marsh and she grabbed you by the arms, was she facing you or was her face turned away from you?

A: She was turned away from me at first, and when Mr. Williams came in I turned around so she was still holding me from the (171) back.

Q: So when she grabbed you how

close would you say you were to Miss Marsh?

A: I was touching her.

Q: Was there anything obstructing your vision from being able to see Miss Marsh's face?

No.

Q: At that time did she have a disguise on her face?

A: No.

Q: And were the lights still on in the livingroom?

A: Yes.

Q: Now, after Mr. Williams told you to lay down on the floor, what if anything did he do?

A: He was still just looking around and --

Q: Where was he looking around?

A: In the diningroom and the kitchen.

TESTIMONY OF CYNTHIA KNIGHTON

Q: What happened after that? What if anything did Mr. Williams do after that?

A: He went upstairs where the other people were.

Q: Where the first man that came in and Ollie Scott was?

A: Right.

Q: When he went upstairs where was Miss Marsh?

A: At the door.

Q: Did you have any conversation with Miss Marsh while you were laying on the floor and after Mr. Williams went upstairs?

(172)A: Yes, I did.

Q: What if anything did you say?

A: I asked her for a drink of water.

Q: What if anything did Miss Marsh say when you asked her for a drink of water?

A: She said no.

Q: At that time how many people were downstairs?

A: Three.

Q: You, Clarissa Marsh and your son?

A: Right.

Q: Did Miss Marsh have a weapon of any kind?

A: I didn't see any.

Q: What if anything was Miss Marsh doing by the door?

A: She would look out the peephole every now and then.

Q: When Mr. Williams went upstairs did Miss Marsh run outside, run out the door?

A: No.

Q: She stayed by the door; is that correct?

A: Right.

TESTIMONY OF CYNTHIA KNIGHTON

Q: How long was Mr. Williams and the first man upstairs?

A: I would say about five minutes.

Q: Was Mr. Williams up there for a period of five minutes?

A: No, he wasn't up there for five minutes; the other guy was up there five minutes.

Q: And during that time Miss Marsh made no effort to leave the (173) home?

A: No.

Q: Could you hear from where you were -- did you hear anything upstairs?

A: Yes, I could.

Q: What did you hear?

A: Noises like --

Q: What kind of noises?

A: Like drawers opening and closing, doors slamming.

TESTIMONY OF CYNTHIA KNIGHTON

Q: Did you hear any conversation or any voices upstairs?

A: No. Just mumbling, you know. I couldn't tell what they were saying.

Q: What's the next thing that you observed?

A: They all came downstairs.

Q: By all of them, who do you mean?

A: The two men and my aunt.

Q: Mr. Williams, the first man and Ollie Scott; is that correct?

A: Right.

Q: When they came down where was Miss Marsh?

A: Still at the door.

Q: What if anything did the men do when they came downstairs?

A: The first man that came in had a paper bag and he gave it to Miss Marsh.

TESTIMONY OF CYNTHIA KNIGHTON

Q: What kind of a paper bag was it?

A: A grocery bag.

(174) Q: A regular kind of a shopping bag? Was it a big bag or was it a --

A: Uh-huh.

Q: Could you tell from where you were whether anything was in it?

A: Well, I could tell it wasn't empty.

Q: And what did Miss Marsh do with the bag?

A: She took the bag.

Q: Was there any conversation between the other man and Miss Marsh at that point?

A: No.

Q: He just came down and gave her the bag?

A: Right.

Q: Did Miss Marsh refuse the bag in any way?

A: No.

Q: Did she say, "Don't give me that bag."

A: No.

Q: Did the man have any weapon at that time?

A: He still had his gun.

Q: How about Mr. Williams, did he still have his gun?

A: He still had his gun.

Q: Now, when Mr. Williams first came in the house you said that he had his hand over his mouth; was he wearing any kind of a disguise other than having his hand over his mouth?

A: No, he didn't have a disguise on.

TESTIMONY OF CYNTHIA KNIGHTON

Q: Was there anything covering his face at all?

(175)A: The first man, who was holding my aunt, took her down into the basement.

Q: And how did he take her down into the basement?

A: Well, he was still holding her, so he took her down holding her.

Q: He was holding her where?

A: By her arm.

Q: Did he say anything to your aunt?

A: No, he did not.

Q: And did he still have his gun?

A: Yes, he did.

Q: Then he just took her down the basement?

A: Right.

TESTIMONY OF CYNTHIA KNIGHTON

Q: When the other man took your aunt down the basement where were you?

A: Still laying on the floor.

Q: Where was Mr. Williams?

A: He was still in the livingroom.

Q: Where was Miss Marsh?

A: Still by the door.

Q: And after the other man left with your aunt how long did you stay in the livingroom?

A: Not even a minute.

Q: Less than a minute?

A: Less than a minute.

(178)Q: And what happened after that?

A: Williams told us to get up and to go in the basement.

Q: And what was Miss Marsh doing at that time?

A: She was still by the door.

Q: Did you see her doing anything by the door?

A: Looking out periodically.

Q: When Mr. Williams ordered you to go downstairs, what did you do?

A: We got up off the floor and went past him, he followed us.

Q: In terms of the basement and the area where Mr. Williams was and where you were, was he between you and the basement?

A: Yes, at that time.

Q: And when you got up were you facing Mr. Williams or were you turned a different way?

A: I was facing him.

Q: You had a chance to see his face again?

A: Uh-huh.

Q: When you walked by Mr. Williams how close did you come to Mr. Williams?

A: Well, I had to go past him to go down the stairs.

Q: Did you walk within touching distance?

A: Yes.

Q: And did you in fact get to the stairs where you walked down the basement?

A: Yes.

(179) Q: Did Mr. Williams still have his gun?

A: Yes, he did.

Q: And what was he doing with the gun as you were walking down the stairs?

A: He was pointing it, you know, behind us.

Q: Pointing it in which direction?

A: Towards us.

Q: Did you walk down the stairs and get into the basement?

A: Yes.

TESTIMONY OF CYNTHIA KNIGHTON

Q: And were there any lights in the basement?

A: Yes, all the lights were on.

Q: The lights were on?

A: Yes.

A: And when you got downstairs where was your son?

A: He was next to me.

Q: Did you see Ollie Scott?

A: Yes, I saw her.

Q: Where was she?

A: She was laying on the floor.

Q: Do you know where she was lying on the floor?

A: Yes, it was another little separate room without a door.

Q: Can you step down from the witness stand and show the area on this sketch where Ollie Scott was laying when you came down the stairs, these being the stairs.

TESTIMONY OF CYNTHIA KNIGHTON

A: Here.

(180)Q: You're indicating this separate room?

A: Yes.

Q: And where was she lying down in this room specifically? Was she behind these cabinets or in the corner --

A: Right here.

Q: Right there in the doorway?

A: Right.

Q: You may take the stand. Did you see the other man?

A: Yes, I did.

Q: Did you see if he had anything in his hands at that time?

A: Yes, he had his gun.

Q: What was he doing with the gun?

A: He was holding the gun. He was trying to get a blanket or canvass(sic) or something unraveled.

Q: And where was this blanket or canvas that you saw?

A: At that time it looked like it was on the table.

Q: Where was that table located?

A: In this same little room on the other side.

Q: The same little room that Ollie Scott was in?

A: Right.

Q: What did you do when you walked down the stairs?

A: I waslked(sic) over to the corner -- well not really a corner, but there was a cabinet in the corner so I walked over to the cabinet.

Q: And can you show on the map, on the sketch, where that (181) cabinet is?

A: Uh-huh, right here.

TESTIMONY OF CYNTHIA KNIGHTON

Q: Indicating the cabinet on the left side of that sketch; is that correct?

A: Right.

Q: And what did you do when you got to that cabinet?

A: I crouched down on my knees.

Q: Can you show the Jury how you crouched down on your knees.

A: Like this.

Q: Where was your son in relation to you?

A: He was right next to me.

Q: On your right or on your left?

A: On my left.

Q: What was he doing? Did he crouch down, too, or what did he do?

A: Yes, he did.

Q: When you got downstairs and you crouched down, where was Mr. Williams?

A: He was standing, not directly in front of me, but kitty-cornered.

Q: In the basement or on the stairs?

A: In the basement.

Q: In terms of distance, how far was he from you?

A: Three feet.

Q: Did he have anything in his hands?

A: He had his gun.

(182) Q: What was he doing with the gun?

A: He was still pointing it towards us.

Q: Towards who?

A: Me and my son.

Q: What if anything happened after you crouched down?

A: Williams said, "Hurry up and tie them up," to the other man.

TESTIMONY OF CYNTHIA KNIGHTON

Q: What did the other man say, if anything?

A: He said, "We're going to have to hurt them."

Q: What's the next thing that happened when the other man said, "We're going to have to hurt them." What if anything did Mr. Williams say?

A: Nothing.

MR. HILL: I'll object to that conclusion; it's a fact that hasn't been established in evidence yet.

THE COURT: On what basis, Mr. Hill?

MR. HILL: He asked what did Mr. Williams said(Sic) after she repeated what someone else said; there's no evidence Mr. Williams heard what the other individual said.

Q: (By Mr. Kriscuinas) Where was the other man when he said

"We're going to have to hurt them."

A: He was still in the same room where my aunt was laying down.

Q: And you said you were in the area by this cabinet crouched down on the floor; is that correct?

A: Right.

Q: And Mr. Williams, you said, was some three feet away from you?

(183)A: Yes.

Q: Somewhere close to -- in the direction of the stairs?

A: Yes.

Q: When the other man said "We're going to have to hurt them," did he say it loud enough so that you could hear it?

A: Yes, I heard it.

Q: How did he say it? Did he yell it out or did he whisper it or how did he say it?

A: He said it in a normal tone. You know; not loud, not soft; just so you could hear it.

Q: Did Mr. Williams say anything.

A: No.

Q: Did you hear Mr. Williams say, "Don't hurt anyone."

MR. HILL: I'll object to the nature of that question. He can ask the witness -- he already has and he's already received that answer. He certainly can't put words in the mouth of the witness, your Honor. I object to the leading nature of the question.

MR. KRISCUINAS: Your Honor, I don't think that is leading because a leading question is a question which demands one answer. For instance. "You were wearing

a red coat, weren't you?" "Yes, I was wearing a red coat." The question was, "Did you hear him say anything like "Don't hurt them," yes or no?" And either she did hear him say that or she didn't hear him say that.

MR. HILL: I would still object to the form of the (184) question. The form that he used -- he received the answer to his question and obviously he didn't like that answer so he's trying to get another answer by suggesting an answer to her.

THE COURT: I don't think Counsel is suggesting an answer, Mr. Hill. I'll overrule your objection.

Q: (By Mr. Kriscuinas) Did Mr. Williams say anything to the effect of "Don't hurt anyone."

A: No, he didn't say anything.

Q: What is the next thing that happened after that?

A: After that I heard two shots.

Q: Where in relation to you did you hear those two shots from?

A: In the little small room where my aunt was.

Q: And was that --

MR. HILL: I didn't hear that answer, your Honor. Would you repeat that, Witness, please.

THE WITNESS: From the little small room where my aunt was.

Q: (By Mr. Kriscuinas) Who else was in that small room with your aunt?

A: Only the first man that came in the house; just him.

Q: And after the two shots were fired where was Mr. Williams?

A: Still standing kitty-cornered from me.

Q: And did you see the other man after you heard the two shots?

TESTIMONY OF CYNTHIA KNIGHTON

A: I saw him after he came over to me.

Q: Did he come out of the little room?

(185) A: Yes.

Q: Did you hear your aunt say anything?

A: No.

Q: After you heard the two shots did you make any effort to try to run away?

A: No.

Q: Why not?

A: Because there was a gun being held on me.

Q: By whom?

A: Williams.

Q: What's the next thing that the other man did?

A: He came to where we were, in the room we were.

TESTIMONY OF CYNTHIA KNIGHTON

Q: Did you see anything in his hands at that time?

A: Yes, he had something in his hands.

Q: What did he have in his hands?

A: Something like a blanket.

Q: Did he have anything in his other hand?

A: His gun.

Q: What did he do after he had the blanket and the gun?

A: He kneeled down till he was like eye level to where I was.

Q: He knelt down the same way that you crouched and showed the Jury?

A: Yes.

Q: What if anything did he do with the blanket?

A: He held it in front of his gun.

(186)Q: Can you show the Jury how he did that.

A: He held it up in front, like the gun was here and over the gun but he could still see me.

Q: Now, when the other man knelt down and he held up the blanket was Mr. Williams still in the basement?

A: Yes.

Q: How far was he from you at that time?

A: Same spot; he hadn't moved.

Q: Did Mr. Williams say or do anything to stop this man from kneeling down in that position in front of you?

A: No.

Q: What's the next thing that happened? Did the other man say anything to you?

A: No, he didn't say anything.

Q: What's the next thing that happened?

A: He shot me.

Q: How many times did he shoot you?

A: Three -- I would say three.

Q: Where were you shot?

A: In my right hand, in my face and my arm.

Q: Can you show us where on your right hand you were shot.

A: Right through my hand.

Q: You're indicating -- is there a scar there?

A: Yes, there is.

Q: You're pointing to an area close to the wrist on your right (187) hand?

A: Uh-huh.

Q: You indicated that he shot you in the arm, also?

A: My arm was broken, so I suppose it was shot.

Q: Yes.

Q: Where are they on your arm? You don't have to lift up your sleeve or anything.

A: They're up here.

Q: You indicated also that -- did he also shoot you in the left hand?

A: My hand was damaged, the bottom part of my left hand, too.

Q: You're indicating the area by the small finger?

A: Yes.

Q: And that's the side of the hand; is that correct?

A: Yes.

Q: You say he fired one shot into your face?

A: Right.

Q: Where was it that the shot hit you in the face?

A: Over here.

Q: You're indicating on the right cheek?

A: Right.

Q: Did you suffer any other wounds?

A: Well, the bullet went through my face to the back of my head, so there's a wound back there, too.

(188)Q: The bullet exited the back --

A: No, it didn't exit it stayed there.

Q: After you were shot what is the next thing that you noticed or observed?

A: Well, my eyes were closed so I didn't see anything, but I could hear. I hear two little pings, you know -- my ears were ringing so I gathered they were gunshot wounds, also, but they

didn't sound like it because there was ringing in my ears.

Q: Did you hear any conversation between the men at all or did you hear the men do anything?

A: No.

Q: What's the next thing that you heard? Did there come a time when you opened your eyes?

A: Yes, after a few minutes I opened my eyes and I didn't see anybody.

Q: The men were gone?

A: They were gone.

Q: Did you see your son?

A: At that point, no, I didn't.

Q: What's the next thing that you did?

A: I got up, then I looked at both of them, you know; and I went to the telephone in the basement.

TESTIMONY OF CYNTHIA KNIGHTON

Q: You said that you got up and you looked at both of them. Who do you mean by both of them?

(189)A: I looked at my son and then I looked at my aunt.

Q: Where was your aunt?

A: She was still in the same room laying down.

Q: Was she moving at all?

A: No.

Q: Did you see your son?

A: Yes.

Q: Was he doing anything?

A: No. He just looked like he was half asleep but he didn't do anything.

Q: You went over to a phone in the basement and what did you do with respect to that phone?

A: I tried to call the police on it but I couldn't hold it.

TESTIMONY OF CYNTHIA KNIGHTON

Q: You couldn't hold the telephone?

A: No, I couldn't hold the telephone.

Q: What kind of phone was it?

A: It was a Trimline wall phone.

Q: Is it the kind that you dial on the wall or the kind that you dial --

A: In the hand.

Q: What did you do at that point?

A: I went upstairs to the bedroom and I used that phone. I was able to get on the floor and I called the police.

Q: When you got upstairs to the bedroom did you notice anything unusual about the condition of the bedroom?

(190)A: Well, yes, the drawers were out and everything was thrown around to the floor.

TESTIMONY OF CYNTHIA KNIGHTON

Q: And did you get hold of the operator of 911 or who did you call?

A: Yes, I called 911.

Q: Did there come a time when police officers came to the house?

A: Yes, they came.

Q: Where were you when the police officers came?

A: I was sitting on the couch in the livingroom.

Q: Did you ever go back down to the basement?

A: No.

Q: Now, Mrs. Knighton, I ask you to take a look at People's Proposed Exhibit Number One. Do you recognize what's in the photograph I hand you?

A: Yes, my aunt's house.

TESTIMONY OF CYNTHIA KNIGHTON

Q: I'll show you People's Proposed Exhibit Number Two; do you recognize what I've handed you in that photograph?

A: Yes, her couch, the livingroom and the front door.

Q: That's the couch that's in the livingroom?

A: Yes.

Q: And does that photograph also show the front door?

A: Yes.

Q: Is that the photograph of the area that you described on the sketch on the left of the blackboard where you indicated the couch, the front door?

(191)A: Yes, it is.

Q: Let me show you People's Proposed Exhibit Number Three which is a photograph; do you

recognize that photograph and can you identify it?

A: Yes, I can. That was where I was crouched in the basement.

Q: Is there a file cabinet in that photograph?

A: Yes, there is.

Q: Is that the same file cabinet that was behind you?

A: Yes, it is.

Q: And is there anything on the floor in front of the area of that file cabinet?

A: Well, it looks like a blanket.

Q: Is that the same blanket that you saw the man with the gun holding?

A: Yes, it is.

Q: Let me show you People's Proposed Exhibit Number Four which is on evidence tag 647524

and ask you to take a look at the contents of the bag on People's Proposed Exhibit Number Four. Do you recognize what this is?

A: Yeah, that's the same blanket.

Q: That's the same blanket that the man held in front of you and shot; is that correct?

A: Right.

Q: Let me show you People's Proposed Exhibit Number Five; do you recognize the photograph that I've handed you there? (192) What area is that?

A: The same area where I was crouched.

Q: is that a closer picture of the file cabinet?

A: Yes, it is.

TESTIMONY OF CYNTHIA KNIGHTON

Q: Also, People's Proposed Exhibit Number Six; do you recognize what is depicted in that photograph?

A: Same area.

Q: And is that a photograph of the cabinet with the door open?

A: Yes, it is.

Q: Let me show you People's Proposed Exhibit Number Seven, which is also a photograph; can you identify what is in that photograph?

A: Yes, this is the bedroom where I made the phone call from.

Q: Does that also show the condition of the bedroom?

A: Yes.

Q: And what is that condition in that photograph?

A: Ransacked.

TESTIMONY OF CYNTHIA KNIGHTON

Q: Let me show you People's Proposed Exhibit Number Eight, which is also a photograph; do you recognize that photograph? What area does that depict?

A: The same room where I made the phone call from.

Q: And also People's Proposed Exhibit Number Nine; do you recognize that photograph?

A: Same room.

Q: Now, let me ask you about these photographs: Do all of these (193) photographs fairly and accurately depict the way that the things looked on the day that you saw them, October 29th, 1978.

A: Yes.

Q: And did there come a time when you were taken to the hospital?

A: Yes.

Q: And did there come a time when you were at the hopital that the police showed you some photographs?

A: Yes, they did.

Q: And did you pick out any photographs of the people that were involved in this robbery and shooting?

A: Yes.

Q: How many people did you pick out in the photographs?

A: Three.

Q: And them photographs themselves -- the photographs that the police showed you, do you recall how many photographs that you looked at?

A: Six or seven.

Q And were all the photographs of just one person or were there some photographs that had more than one person?

A: No, some had more than one person in them.

Q: Let's talk about the photographs that had more than one person; did you recognize any of the people in those photographs?

(194)A: Yes, I did.

Q: And how many people did you recognize there?

A: Two.

Q: And did you tell the police officers that you recognized the people?

A: Yes.

TESTIMONY OF CYNTHIA KNIGHTON

(People's Proposed Exhibits 10 and 11 marked for identification.)

Q: (By Mr. Kriscuinas) Let me show you People's Exhibit Number 10 which is a photograph; do you recognize the photograph that I've handed to you?

A: Yes.

Q: Is that the same photograph that the officers showed you -- one of the photographs that the officers showed you at the hospital?

A: Yes.

Q: How many people that are involed in the case are in that photograph?

A: Two.

Q: Which two are in that particular photograph?

A: The first man that came to the house and Clarissa.

Q: Let me show you People's Proposed Exhibit Number 11, which is another photograph; do you recognize that photograph?

A: Yes.

Q: Is that also one of the photographs that you picked out?

(195)A: Yes, it is.

Q: What photograph is that?

A: Williams.

Recorder's Court

(260) Detroit, Michigan

April 19, 1979

TESTIMONY OF BENJAMIN WILLIAMS

THE COURT: This is File 78-07257, the People versus Clarissa Marsh and Benjamin Williams. Trial in progress.

MR. HILL: Defendant Williams is ready, your Honor.

MR. WALKER: Defendant Marsh is ready, your Honor.

MR. KRISCIUNAS: The People are ready, your Honor.

THE COURT: Thank you, Gentlemen. Are you ready for the Jury.

MR. WALKER: Prior to bringing out the Jury, your Honor, there are a couple of things I would like to put on the record, if I may.

THE COURT: Very well, Mr. Walker.

MR. WALKER: May it please the Court,

for the record, the State has informed me that it wishes to have an officer read a statement that was made by the co-defendant in this case, Mr. Williams, that he denies making. My understanding is that -- and this alleged statement has been what hopefully is known as Bruttenized, but that even with that, given the fact that my understanding is that the co-defendant, Mr. Williams, will (261) not take the stand, there are certain inferences that are raised by this statement even in its altered form that would tend to incriminate my client, Ms. Marsh. Therefore, I would object formally to its introduction in this trial and my authority for that is of course the case of Brutten versus United States, found at 391 US 123. That particular case would apply to the case of Roberts v. Russell, 392 at 293. Also,

Michigan law is fairly clear on this, your Honor, and the problem is that if the co-defendant does not take the stand but the alleged statement is read in, I have no means then by which to cross-examine this statement or the alleged statement to clear up any discrepancies or anything that might incriminate my client, despite the fact that it has been edited. So I therefore make this for the record and object to its introduction in this trial.

THE COURT: What specific portions are you referring to, Mr. Walker?

MR. WALKER: I think the whole thing as a whole, your Honor. It seems to include my client and tends to incriminate her. And even with a curative instruction, even with some altering, I have no opportunity to cross-examine on this statement, and

therefore it does work some prejudice to Miss Marsh, and therefore I object for the record.

THE COURT: Thank you, Mr. Walker.

Mr. Krisciunas?

MR. KRISCIUNAS: Your Honor, first of all we would (262) like to put in the record the actual statement itself so that if any appellate court has to deal with it, they will have the opportunity to see the entire statement prior to it being Brutenized, and I would like to give a copy of the statement to the Court Reporter so that at this time he may incorporate that into the record.

THE COURT: Any objection, Mr. Walker?

Mr. Hill?

MR. WALKER: I understand that it's being done for appellate purposes, your Honor. I would just further add that

this statement, or alleged statement, as it stands, tends somewhat to corroborate the statement of the Complainant, the testimony of the Complainant, that there were some three people involved in this incident and that some of the things in here are not at all corroborated by any other evidence. Therefore, this statement is not cumulative and it is being used as primary evidence; and my fear is that this primary evidence then will be applied to my client as opposed to only the person who allegedly made the statement.

THE COURT: I think that was the type of thing that Brutten was addressing itself to, also.

MR. WALKER: Yes, your Honor.

THE COURT: Mr. Krisciunas?

MR. KRISCIUNAS: Therefore, there was no objection to the statement being

incorporated into the record, and I will (263) put it into the record at this time.

MR. WALKER: I have no objection to that unaltered statement, because for appellate purposes the higher court would have to see both of them to compare and to make a decision.

THE COURT: Okay, Mr. Walker.

Mr. Hill, anything?

MR. HILL: I would not object --

THE COURT: Well, for purposes of the separate hearing would you have any objection to the Court Reporter at this time reading the original statement into the record for appellate purposes?

MR. HILL: For appellate purposes, no.

MR. KRISCIUNAS: Thank you, your Honor.

THE COURT: At this time the statement will go into the record.

MR. KRISCIUNAS: I will also provide the Court Reporter with a copy of the statement as it has been Brutenized so that that can also appear in the record.

I would indicate that now that the statement has been Brutenized we have delated(sic) all references to the Defendant Clarissa Marsh in the statement, and in so doing I believe that we have prepared it in such a way that the statement can now come before the Jury.

I cite to the Court the cases of the People versus Ronald Smith, 27 Mich. App. 442, at page 444, where the defendant's statement did not inculpate the other co-defendants because the (264) trial court made deletions in the defendant's statement of all reference to the names of any co-defendants. In fact, the statement didn't show that there were any other persons involved in the commission

of the crime and in no way served to implicate the other co-defendants. I think that's exactly what we've done here. The statement, as it reads, talks about what Benjamin Williams did and what Kareem did, but makes no reference at all to what Clarissa Marsh did. And I would also cite to the Court the case of United States versus English, 501 Fed. 2nd, a case out of the Seventh Circuit, in which the agent who took the defendant's confession was able to testify in court after the Court instructed the jury on the limited admissibility of the statement, and in the course of the statement regarding the admissions, the agent did not mention any names except the defendant's, and did not describe nor mention any names. However, he did state that two other individuals were involved in the robbery. That statement, and the

admission of that, the admission by the defendant, was found to be proper by the Seventh Circuit. So I think we've done everything under the spirit of Bruten and to protect the rights of the Defendant Clarisa Marsh, and therefore I would ask that the statement be allowed into evidence in its Brutenized form.

THE COURT: May I see the statement.

MR. KRISCIUNAS: Yes, your Honor.

THE COURT: Mr. Walker, what was the case that (265) you cited?

MR. WALKER: That was Roberts v. Russell, 392 US 293, a United States Supreme Court case.

MR. KRISCIUNAS: Your Honor, I think also that originally the People's position was that rather than delete all references to Clarisa Marsh that all references to Kareem Martin would be labeled "Kareem Martin" or "Kareem", and

all references to Clarissa Marsh would be labeled something like I think the letter "A", or "John Doe Number One", and I find support for that position in the case of People versus Miller, 88 Mich. App. 210, a 1959 case, in which in each confession the names of any co-defendants were excised and replaced with John Doe Number One, Number Two or Number Three, as needed. Additionally, instructions were given that the confessions were to be used only in relation to the particular confessing defendant.

I submit that the final result that we have given the Court is a statement that was agreed upon between myself and Defense Counsel, Defense Counsel of course not waiving any objections to the admissibility of the entire statement. But it's a statement that we went over and he prepared a statement deleting

certain portions which he thought would be unfair, and I deleted certain portions which I thought to be unfair, and we agreed upon the portions that the Court has, notwithstanding Counsel's objection to the entire statement.

THE COURT: Mr. Walker, is that a correct statement?

(266)

MR. WALKER: Yes, your Honor. I never did waive any objections to that, of course, and I was just concerned, and I'm still concerned about the fact that the statement, even as altered and even with the curative instruction, still is the only evidence of certain elements of the crime, and therefore is not cumulative, and would be inadmissible under People v. Rollins, 33 Mich. App., page 1. So I think it would probably be appropriate at this time to renew my

motion for severence that I have made numerous times throughout the trial and pretrial motions.

THE COURT: What portions are you specifically referring to in the statement?

MR. WALKER: Well, the statement does contain certain events that occurred prior to entrance into the scene on Mendota Street, and those, in my opinion, constitute the only evidence of any kind of premeditation or intent, and it is not cumulative of other evidence, and therefore, under Michigan case law, this would not be admissible.

THE COURT: Mr. Krisciunas, do you have any argument on that particular point?

MR. KRISCIUNAS: No, your Honor, I believe that the arguments have already been made in the motions for severance and I'll stand by those arguments.

TESTIMONY OF BENJAMIN WILLIAMS

THE COURT: Very well. The Court will take about 10 or 15 minutes to look up the pertinent parts of the cases (267) Counsel has cited. I'll give you a decision as soon as I come back out.

(Short recess.)

(Whereupon, statement read into record by this Reporter as follows:)

October 30, 1978

11:40 p.m.

Sergeant Richard Davies

Sergeant Daniel McCarty

Benjamin Williams

B/M/18 dob 3/7/60, 2755 Lawley 892-6992

On Sunday evening, October 29, 1978, at about 6:30 p.m., I was over to my girl friend's house at 237 Moss, Highland Park, when I received a phone call from a friend of mine named Kareem Martin. He said that he had been looking for me and

James Coleman, who I call Tom. He asked me if I wanted to go on a robbery with him. I said okay, and he said that he'd be by and pick me up. About 15 or 20 minutes later, Kareem and Clarissa, who I call "KC", who is Kareem's girl friend, came by in his black Monte Carlo car. I got in the car and Kareem and Clarissa told me that we were going to stick up this crib where the lady knew them. Clarissa said that the place was a numbers house where she used to work and the lady knew her so there would be no trouble getting in because she owed her a hundred dollars and she would let them in. Kareem said that there would be over (268) $5,000 or 10,000 in the place. Kareem said that they would have to take them out after the robbery because they knew them. Kareem had a big silver gun and he gave me a long barrel .22 caliber

revolver. We then drove over to this house and parked the car across the street near the house. The plan was that I was supposed to wait outside until they got inside and then KC (Clarisa) was supposed to come out on the porch and let me know that Kareem had stuck the place up. Wait a minute, the plan was that I would wait in the car in front of the house until KC signaled me and then I would move the car down across the big street because they didn't want anyone to see the car. Okay, Kareem and KC went up to the house and went inside. A couple of minutes later KC came out on the porch and waived. I moved the car and walked up to the house. I knocked on the door and KC opened the door. As I entered Kareem and this older lady were in the dingingroom and this little boy and another younger woman were sitting on the

couch in the front room. I pulled my pistol and told the younger woman and the little boy to lay on the floor. Kareem took the older lady upstairs and he had a pistol also. I stayed donstairs with the two people on the floor and KC. After Kareem took the lady upstairs, I went upstairs and the lady was laying on the bed in the room to the left as you get up the stairs. The lady had already given KC two bags full of money before we had ever got upstairs and she had put them in her purse. Kareem had thought that she had more money and that's why we went (269) upstairs. Me and Kareem started searching the rooms but I didn't find any more money. Before Kareem took the lady upstairs, the lady was asking Clarissa, "Why are you doing this to me?" Clarissa didn't answer her as I recall. I came downstairs and then Kareem came down with

the lady. I said, "Let's go, let's go." Kareem said no. Kareem then took the two ladies and the little boy down the basement and that's when I left to go to the car. I went to the car and got in the back seat. A couple of minutes later KC came to the car. She got behind the wheel and drove the car around the corner from the house and parked on the big street. A couple of minutes later, Kareem came to the car and said he thinks that the girl was still living because she was still moving and he didn't have any more bullets. He asked me how come I didn't come down the basement and I said, "I wasn't doing no shit like that." They then dropped me back off at my girl's house in Highland Park and I was supposed to get together with him today and get my one-third share of the robbery after he had counted the money. That's all.

TESTIMONY OF BENJAMIN WILLIAMS

Signed, Benjamin Williams.
Completed 12:45 a.m.,
10/31/78.
Sergeant Richard Davis.
Sergeant Daniel McCarty.

THE COURT: Gentlemen, I've had a chance to review the cited cases, and under the case law I find there is authority for allowing the statement of Benjamin Williams with the deletions. (270) I also find that the deletions are extensive as compared to the original statement, and any mention whatsoever of co-defendant Marsh does not appear in the amended statement. Therefore, this statement will be allowed to be read to the Jury, with the understanding that the statement to be read is the deleted statement with the deletions as they exist and have been agreed to by Defense Counsel, with the understanding that

Defense Counsel's objection to the entire matter still remains. And I would caution the Prosecution not to elicit anything that has been deleted from the statement.

MR. KRISCIUNAS: From the officer who is reading the statement: is that correct?

THE COURT: That is correct. I would also caution Defense Counsel not to elicit anything from the officer relative to the deletions in that statement.

MR. KRISCIUNAS: I might indicate also for the record, your Honor, that the officer who will be reading the confession into evidence will be reading a Xerox copy that we have made the deletions on. Obviously, we couldn't delete anything from the original in the event, it has to be used at some later date. The copy of the original has been

placed in a folder so that none of the deletions will be visible to any members of the Jury, and I would ask Brother Counsel not to take the statement out of that folder for purposes of cross-examination so that the Jury won't see the deletions.

(284)

TESTIMONY OF DANIEL McCARTY

(Discussion off the record.)

THE COURT: Are we ready for the Jury, Gentlemen?

MR. KRISCIUNAS: Yes, your Honor.

THE COURT: Officer McCarty has been instructed as to the admission?

MR. KRISCIUNAS: Yes, your Honor.

THE COURT: Okay.

(Whereupon, at 10:56 o'clock a.m., Jury returned to courtoom.)

THE COURT: Good morning.

Do all Counsel stipulate that the members of the Jury are present and in their respective places?

MR. KRISCIUNAS: So stipulated, your Honor.

MR. WALKER: So stipulated.

MR. HILL: Defendant Williams so stipulates, your Honor.

THE COURT: Thank you.

TESTIMONY OF DANIEL McCARTY

Sorry for the delay, Ladies and Gentlemen. Mr. Krisciunas?

D A N I E L M c C A R T Y

sworn on behalf of the People, was examined and testified upon his oath as follows:

DIRECT EXAMINATION BY MR. KRISCIUNAS:

Q: Please state your full name, sir.

A: Daniel McCarty.

(285) Q: Where are you employed?

A: Detroit Police Department.

Q: What section are you assigned to?

A: Homicide.

Q: Any special section of that?

A: Squad Seven.

Q: And I want to direct your attention back to October 30th, 1978, at approximately 11:40 in

the evening. Were you at Detroit Police Headquarters at 1300 Beaubien?

A: That's correct.

Q: Did you see anybody at that time, sir?

A: I saw the Defendant, Benjamin Williams.

Q: Do you see him in court today?

A: Yes, I do, he's sitting at Counsel table with the maroon pants and white shirt.

MR. KRISCIUNAS: Let the record indicate the witness has identified the Defendant, Mr. Benjamin Williams.

Q: (By Mr. Krisciunas) When you saw Mr. Williams did you see him alone or with some else?

A: With Sergeant Richard Davies. He was also assigned to Squad Seven.

TESTIMONY OF DANIEL McCARTY

Q: Was the Defendant advised of his constitutional rights?

A: Yes, he was.

Q: How was he advised of his constitutional rights?

A: We used the standard Detroit Police Department notification (285) of rights. The Defendant was read the rights, given a chance to read it over himself, he initialed each right in the left-hand corner and he signed the sheets and indicated that he then understood his rights.

Q: Would you read to the Jury the exact rights which were read to the Defendant.

A: Number one, "I understand that I have a right to remain silent and I do not have to answer any questions put to me or make any statements.

Number two: "Any statement I make or anything I say will be used against me in a court of law.

Number three: "I have the right to an attorney, a lawyer, present before and during the time I answer any questions or make any statements.

Number four: "If I cannot afford an attorney, a lawyer, one will be appointed for me without cost by the Court prior to any questioning.

Number five: "I can decide at anytime to exercise my rights and not answer any questions or make any statements."

Q: Was the Defendant asked whether he understood these rights?

A: Yes, he was.

Q: And what was his reply?

A: He stated he did.

Q: And did he initial all of those rights?

A: That's correct.

(287) Q: And how did he initial those rights?

A: On the left-hand side of the paper next to each number, one through five, he initialed "BW".

Q: Did you determine whether or not the Defendant could in fact read and write?

A: He stated he could.

Q: How far did he go in school, sir?

A: He stated he went to 11th grade at Ecorse, Michigan.

Q: In fact he wrote that in his own handwriting in the remarks section?

A: Yes.

Q: Now, after he was advised of his constitutional rights was he asked whether or not he wished to make a statement regarding this case?

A: Yes.

Q: And what was his reply?

A: He indicated he did.

Q: And did he in fact make a statement?

A: Yes, sir, he did.

Q: Now, physically, how was the statement taken?

A: He gave us a narration of the facts and Sergeant Davies typed it in my presence.

Q: And after he typed the statement on a piece of paper,

was the Defendant given an opportunity to read over that statement to see if it was accurate?

(288)A: Yes, he did.

Q: And was he given the opportunity to make any changes or corrections in the statement?

A: Yes, he did.

Q: Did he in fact make any such changes or corrections?

A: He initialed I believe twice where there was a correction to be made.

Q: Now, after the paper was typed, after the statement was typed, the Defendant had an opportunity to read over that statement?

A: That's correct.

Q: And did he in fact sign that statement?

A: Yes, he did.

Q: Did you also sign that statement?

A: Yes, I did.

Q: And did Sergeant Davies sign the statement?

A: Yes, he did.

Q: Would you read please the statement that was made by the Defendant, Benjamin Williams, regarding this case.

A: It's dated october the 30th, 1978, 11:40 p.m., and Sergeant Richard Davies and my own name appear at the top. The Defendant's name is Benjamin Williams, black male, 18, date of birth of 3/7/60, lives at 2755 Lally, and has a phone number of 892-6992.

TESTIMONY OF DANIEL McCARTY

October the 29th, 1978, (289) at about 6:30 p.m., i was over to my girl friend's house at 237 Moss, Highland Park, when I received a phone call from a friend of mine named Kareem Martin. he said he had been looking for me and James Coleman, who I call Tom. He asked me if I wanted to go on a robbery with him. I said okay. Then he said he'd be by and pick me up. About 15 or 20 minutes later Kareem came by in his black Monte Carlo car. I got in the car and Kareem told me he was going to stick up this crib, told me the place was a numbe s house. kareem said there w ld be over $5,000 or $10,00 in the place.

Kareem said he would have to take them out after the robbery. Kareem had a big silver gun. He gave me a long barrelled .22 revolver. We then drove over to this house and parked the car across the big street near the house. The plan was that I would wait in the car in front of the house and then I would move the car down across the big street because he didn't want anybody to see the car. Okay, Kareem went up to the house and went inside. A couple of minutes later I moved the car and went up to the house. As I entered, Kareem and this older lady were in the diningroom, a little boy and another younger woman were

sitting on the couch in the front room. I pulled my pistol and told the younger woman and the little boy to lay on the floor. Kareem took the older lady upstairs. He had a pistol, also. I stayed downstairs with the two (290) people on the floor. After Kareem took the lady upsairs I went upstairs and the lady was laying on the bed in the room to the left as you get up the stairs. The lady had already given us two bags full of money before we ever got upstairs. Kareem had thought she had more money and that's why we had went upstairs. Me and Kareem started searching the rooms but I didn't find any money. I

came downstairs and then Kareem came down with the lady. I said, "Let's go, let's go." Kareem said no. Kareem then took the two ladies and little boy down the basement and that's when I left to go to the car. I went to the car and got in the back seat. A couple of minutes later Kareem came to the car and said he thinks that the girl was still living because she was still moving and he didn't have any more bullets. He asked me how come I didn't go down the basement and I said I wasn't doing no shit like that. He then dropped me back off at my girl's house in Highland Park and I was supposed to get

together with him today, get my share of the robbery after he had counted the money. That's all."

Both pages are signed by the Defendant, Benjamin Williams. This statement was completed at 12:45 a.m., on October the 31st, 1978. It was signed by Sergeant Davies and myself.

MR. KRISCIUNAS: I have no further questions of this witness.

THE COURT: MR. HILL?

MR. HILL: I have just one question.

CROSS EXAMINATION BY MR. HILL:

Did I understand you correctly when you said that there were initials beside the two pages that you read from, or when you

read that statement were you referring to something else?

Repeat that again.

I thought I heard you on direct examination say there were initials placed alongside of each page that you read from.

No, I meant constitutional rights, the five rights that were read to him.

MR. HILL: I have no further questions.

THE COURT: Mr. Walker, any questions?

MR. WALKER: I have no questions.

MR. KRISCIUNAS: Thank you, Officer.

(Witness excused.)

MR. KRISCIUNAS: At this time, your Honor, the People rest.

THE COURT: Thank you.

TESTIMONY OF DANIEL McCARTY

THE COURT: Ladies and Gentlemen of the Jury, at this time I'll give you an instruction. The prosecution has introduced evidence of a statement which they claim was made by the Defendant Benjamin Williams. Before you may consider any such out-of-court statement as evidence against the Defendant, you (292) must determine two things: First, you must find that the Defendant in fact made the statement as it was given to you. Obviously, words said to have been written or said by the Defendant should not be used against him unless he actually spoke or wrote those words. Only so much of the statement as was actually made by the Defendant may be considered as evidence against him.

Second, if you determine that the statement as made by the Defendant, you must further consider whether the

statement or any part of it is true. You should consider the facts and circumstances surrounding the making of the statement along with all the other evidence in the case, judging its truthfulness and deciding how much weight, if any, the statement deserves.

Should you accept the statement or any part thereof as true, you may then give it whatever weight you believe it deserves.

The statement of Co-Defendant Williams has been admitted into evidence aainst him only. I caution you that it may be used in considering only the guilt or innocence of Defendant Benjamin Williams. Under the rules already given to you, it must not be used or considered in any way against Defendant Clarissa Marsh. To do so would be most unfair and in violation of the oath that you took as

Jurors; just so you all understand that.

Do you rest, Mr. Krisciunas?

(293)

No.

Q: Is this the truth?

A: Yes.

Signed: Benjamin Williams

THE COURT: Is the defense ready to proceed?

MR. HILL: Yes, your Honor.

MR. WALKER: Your Honor, now that the State has rested I have some motions I would like to bring.

THE COURT: Very well.

MR. WALKER: I would ask the Court on behalf of Clarissa Marsh to direct the verdict in her favor, and particularly on Count III, that is the count of Assault With Intent to Murder. The elements of Assault With Intent to Murder, as I understand, your Honor, are that there must be specific intent, there must be an assault, and that assault, if successfuly(sic), would have resulted in

the death of the person assaulted. I would indicate to the Court that of course the Prosecution has the burden of proof of proving each and every element of each and every crime charged beyond a reasonable doubt.

We have seen conclusive evidence that Clarissa Marsh was not armed on October 29th, 1978. There is absolutely no evidence of any intent on her part to assault anyone with the intent to murder. It is also very clear from the evidence that she was not in the basement when the assault on Miss Knighton occurred; that in fact there is no evidence that she was even in (297) the house at that point.

Finally, I would indicate that the only action that was in evidence as to Miss Marsh, was a collision, if you will, with the complainant, Miss

Knighton, at the doorway. I specifically asked Miss Knighton, did Miss Marsh approach you. No. It was clearly a case of Miss Marsh standing at the door, the complainant charging the door and then colliding with her. There was no aggression on the part of Miss Marsh, and therefore I would state that there was no assault here. And I know that is what the State argued earlier as the basis for this charge of assault with intent to murder. So I would indicate that there is no intent shown, no specific intent. Certainly, she was not armed; certainly she was not in the basement, she was not in the house. There was no assault and she was not the aggressor.

And finally -- well, that's it, your Honor. I would ask that the Court direct a verdict as to Miss Marsh on the count of assault with intent to murder, that it not be submitted to the Jury.

MOTION FOR DIRECTED VERDICT

THE COURT: Thank you, Mr. Walker.

Is there anything further that you wish to bring out? Are there any other motions at this time?

MR. WALKER: Yes. I would also like to have the Court direct a verdict as to Miss Marsh on the two counts of felony murder.

Again, there is absolutely no showing, absolutely (298) none, of any malice on her part. There is no showing of specific intent. All we have in regard to that is mere presence. And of course, as the Court is aware, mere presence does not constitute a crime. There has been no evidence that any murders were part of any kind of -- if you will, of any plan, if there was indeed a plan. And certainly the intent of others cannot be ascribed to Miss Marsh.

MOTION FOR DIRECTED VERDICT

So therefore, I would also move that a directed verdict -- a verdict be directed in Miss Marsh's favor on the first two counts of felony murder.

THE COURT: Thank you, Mr. Walker.

Mr. Hill?

MR. HILL: Thank you, your Honor. Briefly, I would at this time move the Court to direct a verdict of not guilty as to Defendant Benjamin Williams, based upon what I consider the total lack of evidence that has gone into this as a result of the testimony of the one witness that has testified in this matter, Cynthia Knighton. Her testimony, as the Court recalls, clearly indicated that Defendant Williams, while there, did not surely participate in any assault upon her person, and certainly any assault upon the person of the deceased;

that he did not, according to her testimony, shoot his gun, he did not kill anyone, indeed, as I stated, he did not assault the person of Cynthia Knighton. And as has been pointed out by my Brother Counsel, since count III requires a specific intent, her testimony (299) even taken in light of the so-called confession that has been read into the record made by the Defendant Williams, this does not supply that necessary element in that particular count to constitute a case that the Jury can decide, for the reason that there are no facts from which inferences can be drawn to submit that going to the Jury. It would mean that the Jury would have to guess as to the innocence or the guilt of the Defendant, Benjamin Williams with regard to Count III.

With regards to Counts I and II, I would respectfully submit to the Court that the People have not sustained

their burden at this stage of the proceeding and shown that there was actually an armed robbery committed by the Defendant Benjamin Williams. While there might have been a larceny from a building or some other crime, they certainly haven't shown the elements necessary to constitute the crime of robbery armed. My recollection is that Cynthia Knighton did not testify that Benjamin Williams in any way threatened the security of people there for purposes of robbing either Mrs. Knighton or Mrs. Scott, and I would say that the elements of that particular crime, as they apply to Benjamin Williams, have not been sustained; and even though there might be some evidence which can be gained from this so-called admission made by the Defendant Benjamin Williams, I would say that it falls short of that insofar as

the People have argued that he aided and abetted, and for the reasons stated, I would move this Court to direct a verdict of not guilty with regard to (300) the three counts remaining in the criminal Information.

THE COURT: Thank you, Mr. Hill.

Mr. Krisciunas?

MR. KRISCIUNAS: Your Honor, in response to the motion for a directed verdict, at the close of the People's proof as a matter of law, and the Court must view the evidence in the light most favorable to the Prosecution. There must be no evidence from which the jury could reasonably infer the defendant's guilt in order to justify the taking the case from the jury.

In support of that proposition I cite the Court the case of People

versus Compton, 23 Mich, App. 42; People versus Watkins, 36 Mich. App. 380. The Court cannot weigh the sufficiency of the evidence or the credibility of the witnesses or the inferences to be drawn from the testimony. In support of that I cite the cases of People versus Abernathy, at 253 Mich. 583; People versus Camak, 5 Mich. App. 55; People versus Slater, 164 Mich. 166. The Court can only take the case from the Jury if it can say that viewing the evidence in the light most favorable to the people, it could not find guilt. The People's theory in this case is that both Defendants aided and abetted in the commission of the robbery and that their intent can be seen, if not from their words, from their conduct throughout the incident, and the intent to kill can be inferred from their conduct as well as

their malice. Clarissa Marsh specifically (301) stopped the victims from escaping; she took the money. I think that all of the surrounding circumstances of the robbery and her conduct can be inferred by the Jury to show the specific intent necessary to commit the crime of assault with intent to murder as well as the intent to kill necessary in first degree felony murder.

I think that it becomes a question of fact for the Jury and that it should be left for the Jury to determine whether or not she had that intent. And I think that if you look at the evidence most favorable to the Prosecution, a reasonable mind could find that she had the intent necessary and the malice necessary.

Likewise, the same thing applies to the Defendant Benjamin

Williams. Brother Counsel has stated that there is no evidence to show that he was involved in the robbery. But contrary to that, the first statement that was repeatedly made by the Defendant as he entered the house was, "Where's the money," and it was at that point that he had his gun out. And Walter Martin had a gun out, also. It was then at that point that the lady went upstairs -- Ollie Scott went upstairs with Walter Martin, and then Mr. Williams also assisted in keeping the victims in place. And that also, his conduct downstairs at the time of the killing, totally raises an issue of fact for the Jury as to whether or not he had the requisite intent to kill and whether he had the requisite malice to make him guilty of these crimes.

(302) Therefore, I would ask the Court to deny the motion for a directed verdict.

MOTION FOR DIRECTED VERDICT

THE COURT: Thank you, Mr. Krisciunas.

Mr. Walker?

MR. WALKER: Very briefly, your Honor. The Prosecutor has made a statement in regards to Miss Marsh on the assault with intent to murder; that the intent would be inferred from the act of the felony. So what he wants here is felony assault. He wants to be relieved of the responsibilities of showing each and every element of assault with intent to murder by saying well it occurred in the commission of a felony and he's trying to tie the whole package in, and there's no such thing in our law as felony assault. The State is never relieved from the obligation of proving each and every element of a crime unless designated by statute, such as the felony murder statute.

MOTION FOR DIRECTED VERDICT

THE COURT: I think it becomes a question of fact, and on the motion for a directed verdict, the Court must look at the testimony in the light most favorable to the Prosecution to determine whether or not there is testimony on all of the elements of the offenses, and based upon the testimony that the Court has heard, the Court is of the opinion that the motion for a directed verdict on behalf of Clarissa Marsh as to Counts I, II and III, and the motion on behalf of Defendant Williams on Counts I, II and III, should be and is hereby denied.

Are you ready to proceed?

MR. HILL: That's all.

You may cross-examine.

THE COURT: Mr. Krisciunas?

MR. KRISCIUNAS: I have no questions.

THE COURT: Mr. Walker?

MOTION FOR DIRECT VERDICT

MR. WALKER: I have no questions.

THE COURT: Anything further, Mr. Hill?

MR. HILL: I have no further questions.

THE COURT: Thank you, Mr. Williams, you're excused. (Witness excused.)

MR. HILL: At this time, your Honor, the Defendant Benjamin Williams would rest his case.

THE COURT: Thank you, Mr. Hill.

Mr. Walker?

MR. WALKER: I would like to call at this time Clarissa Marsh.

TESTIMONY OF CLARISSA MARSH

(307)

C L A R I S S A M A R S H,

sworn on behalf of Defendant Marsh, was examined and testified upon her oath as follows:

DIRECT EXAMINATION BY MR. WALKER:

Q: Would you give your name and address for the Jury, please.

A: Clarissa L. Marsh, 14287 Mark Twain.

Q: How old are you, Miss Marsh?

A: I'm 33 years old.

Q: What is the extent of your education?

(308) A: I have two-and-a-half years of business college.

Q: Are you married?

A: No, I'm divorced.

Q: Do you have any children?

A: Yes, I have two boys, Ronald, seven, and John, five.

Q: Do your boys live with you?

A: Yes, they did.

Q: You say they did?

A: They're now living in Ohio with my mother.

Q: Why is that?

MR. KRISCIUNAS: Objection, materiality.

THE COURT: How is that material, Mr. Walker?

MR. WALKER: I'll withdraw the question.

THE COURT: Very well, objection sustained.

Q: (By Mr. Walker) On October 29th, 1978, were you with a man who has been referred to here as Kareem Martin, a Walter Martin?

A: Yes, I was.

Q: Have you seen him since that date?

A: No, I haven't.

Q: Up to that point how long had you known the man we've been referring to as Kareem Martin?

A: Well, I met Kareem in November of 1977.

Q: And what were the circumstances of that meeting?

A: Well, I knew his sister and I went by his sister's place, we (309) were going shopping or something, I don't remember exactly what, but I went by the house. He was there and I was introduced to him and, you know, we started talking and started dating.

Q: This was in November of '77, I believe you said?

A: Right.

Q: Did that relationship with Mr. Martin develop further?

A: Yes, it developed further. We had more or less started going together in December; I guess that was shortly after Christmas.

Q: Did you ever have occasion to introduce Mr. Martin to your sons?

A: Yes, I did; that was around Christmas. In fact, it was Christmas Day. He had bought the boys some Christmas presents and I took them over to pick up their Christmas gifts and this is when they first met Kareem Martin.

Q: Did the relationship continue beyond that point?

A: Yes, it did. The relationship, you know, grew because of the way he was with the boys at

first. He was real good with the boys. He showed a lot of interest and concern in my boys.

Q: I take it that was important to you?

A: Yes, it was very important to me.

Q: Now, you continued to see Mr. martin; is that right?

A: Yes, I did.

Q: Did there come a time when you learned that he had a drug problem?

A: Yes, I did.

Q: And approximately when was that?

A: It was May or June; I'm not sure of which month but it was somewhere around -- I think it was June.

TESTIMONY OF CLARISSA MARSH

Q: And how did you happen to come by that information?

A: Well, we had left the house, the boys and I, going to the store; we came back a little earlier than Kareem had suspected, and me not knowing, I walked into the den in the house and he was shooting up.

Q: When you say shooting up, what do you mean by that?

A: He was -- well, his fix, whatever he needed, the amount of drugs, he was taking them then.

Q: And he was using a needle?

A: Yes, he was.

Q: Now, you said he was at your house?

A: Right.

Q: Where was that?

A: Kareem had moved into the house with the boys and I.

Q: Now, this was in May or June, I believe you said?

A: It was in June.

Q: What was your reaction to the discovery of this drug habit?

A: It threw me all off guard. I didn't know what to say or what to do. I just turned around and took the boys by the hand and (311) we got in the car and we kind of like rode around for a little so I could try and get my thoughts together because this is the first time I had ever had any, you know -- anything to do with anybody that had been on drugs.

Q: Now, did Kareem ever ask you for money during this period of time?

A: Yes, he did -- he asked me quite often for money, you know. Like sometimes he didn't have the money to cop his drugs for that particular day.

Q: And did you have the money to give him?

A: No, not always.

Q: Did you attempt to obtain the money for him?

A: Yes. I borrowed money from other people. I borrowed the money from my mother, my ex-father-in-law, my brother and friends of the family.

Q: Are you okay? Can you proceed? Would you like a drink of water?

A: Okay.

MR. WALKER: Could we take a five-minute break, your Honor, and allow Miss Marsh --

MR. KRISCIUNAS: I have no objection.

THE COURT: Fine.

Ladies and Gentlemen of the Jury, I'll ask you to step in the juryroom at this time for about five minutes.

(Whereupon, at 11:34 o'clock a.m., Jury excused from courtroom.)

(312) (Whereupon, Jury returned to courtroom at 11:42 o'clock a.m.)

THE COURT: Do Counsel stipulate that all the members of the Jury are present and in their respective places?

MR. KRISCIUNAS: The People so stipulate, your Honor.

MR. WALKER: So stipulated.

MR. HILL: Defendant Williams so stipulates, your Honor.

TESTIMONY OF CLARISSA MARSH

THE COURT: You may continue, Mr. Walker.

(Whereupon, Witness Clarissa Marsh resumed the stand.)

Q: (By Mr. Walker) Miss Marsh, I believe we were talking about a period in June of 1978 when you discovered that Kareem Martin was a drug addict.

A: Yes.

Q: Were there any other things about him at that point in time, around that point in time, that you noticed about him?

A: His attitude had changed; it became real aggressive and kind of overbearing. His attitude changed towards me and the boys.

Q: What do you mean when you say kind of overbearing?

A: Like he had a firm conviction that children should be seen and not heard, and it was a general practice around our house that, you know, the boys were allowed to play wherever they wanted to -- you know, it was our house, all three of us, you (313) know, and he, like, you know, didn't want the boys to play in the front room, if that's where they chose to play at, or if they wanted to go outside and play he wouldn't let them go out if he felt like he wanted them to stay in the house. And if they wanted to go to the neighbors house, if he had any argument with anyone in the block then they weren't allowed to go over there, or anything like that.

Q: Now, you said something about it was our house. What do you mean by that? Who owned the house on Mark Twain?

A: It's my house and it's my boys' house.

Q: Now, did you discuss these things with him, the drugs and his change of attitude?

A: Yes, we had talked about it several times. He had assurred (sic) me a couple of times that, you know, he was going to get off of drugs but it just seemed as though his habit kept getting bigger and bigger.

Q: Did you ever just say, "Hey, get out of my house."?

A: Three or four times. He refused to leave; said he wasn't going to go anywhere;

that this was his home; this is where he was going to stay.

Q: Now, you have an automobile, too, do you not?

A: Yes, I have a '77 -- I had a '77 black Monte Carlo.

Q: Now, did Kareem have a car?

A: No, he took over my car.

Q: What do you mean when you say he took over your car? You (314) mean borrowed it?

A: No. It had got to the point where if I wanted to go to the store, if I wanted to go wherever, I had to ask him if he was using the car, and if he wasn't using the car then he would let me use it.

Q: This is difficult, but I have to ask you this: Did this man every(sic) physically abuse you?

A: Yes, he snatched me around a couple of times, he slapped me. We had quite a few arguments.

Q: What was your state of mind like in June of 1978, given all the things you've just told us?

MR. KRISCIUNAS: Objection, materiality, your Honor, to her state of mind.

THE COURT: Mr. Walker?

MR. WALKER: Well, I believe it's relevant, your Honor. We're talking about her relationship with this man who is an accomplice in the incident of October 29th, and her attempts to rid herself of him and the control that he had over her, so her state of mind is very relevant.

THE COURT: I'll sustain the objection, but I will allow you to rephrase the question and lay a better foundation.

TESTIMONY OF CLARISSA MARSH

Q: (By Mr. Walker) Were you ever hospitalized in June of 1978?

A: Yes, it was June the 18th. I was hospitalized for attempt suicide.

Q: Did you tell any of your family about this attempted suicide (315) at that time?

A: I didn't. Some of my relatives, they came to the hospital; I think it was one of them that called my mother and got in touch with my brother and let them know that I had tried to kill myself. My mother came up the next day from Ohio.

Q: Why did you try to kill yourself, Clarissa?

A: I was depressed with the situation; I didn't know how to

get out. I had tried and I just didn't know what to do anymore and I was just tired. and the way things were going, the boys would be better off with my mother or with their father rather than, you know -- that's something I couldn't get myself out of.

Q: Now, you stated that Kareem asked you for money oftentimes?

A: Yes.

Q: And that you then borrowed that money from other people?

A: Right.

Q: Did there ever come a time when he himself went to your friends to borrow money on your behalf or on his own behalf?

A: Yes.

MR. KRISCIUNAS: Objection, your Honor, unless the witness was present at those times. I'll object to any hearsay, your Honor.

THE COURT: Sustained.

Q: (By Mr. Walker) Were you ever present -- did you ever borrow money from people at his orders?

(316)A: Yes, I have, on quite a few occasions.

Q: And did there come a time when you borrowed money from your mother?

A: Yes.

Q: And only on one occasion?

A: At least three or four times I borrowed money from my mother and she has wired it to me at the Western Union Office and we'd go down to get it, and as

soon as I'd go in and get it he'd take the money to go get his fix.

Q: Did you borrow money from other relatives besides mother?

A: Yes, I borrowed money from my ex-father-in-law, I borrowed money from my ex-husband, I borrowed money from my brother, I borrowed money from friends of the family, people that I knew.

Q: Did your mother ever ask you about why you kept borrowing all this money?

A: Yes, and I just told her I needed the money for the boys, you know -- you know, just for me and the boys; that was always the excuse I used.

TESTIMONY OF CLARISSA MARSH

Q: Let's go on now. In the summer of 1978 did the situation between you and Kareem change in any way during that period of time?

A: I'm sorry, what did you say?

Q: The period of time between June and October, when this crime occurred, were there changes in the relationship between you (317) and Kareem during that period of time?

A: Yes, it just kept on getting worse and worse and worse, and he just kept, you know -- well, I guess he just needed it for his fixes, you know. And like I had borrowed, you know -- I borrowed money from everybody I could. I was trying to pay people back and was still borrowing.

TESTIMONY OF CLARISSA MARSH

Q: Now, prior to October 29th, 1978, did you know a woman named Ollie Scott?

A: Yes, I did.

Q: How did you know her?

A: I used to work with her.

Q: Did you ever borrow money from Ollie Scott in the summer of 1978?

A: I borrowed money then and prior to that.

Q What amounts, do you remember?

A: Fifty, a hundred, twenty-five.

Q: Mrs. Scott lent you this money willingly; is that correct?

A: Yes.

Q: Did you have, prior to October 28th or 29th, 1978 -- aside from the borrowing of the money -- did you have a conversation with her? Did you ever talk with Ollie Scott?

A: Yes, we talked quite a few times. Most of the time I was calling her to tell her that I didn't have the hundred dollars that I owed her; that I would get it back to her just as soon as I got it, and that was just to let her know (318) that I wasn't trying to, you know, not pay her back the money.

Q: Now, did you have occasion to go to the hospital in October of '78?

A: No, I didn't go to the hospital. What had happened is that they had walked into the house on me, I thought everyone was gone, and I had taken about 40 or 50 Valiums and they had walked in as I was throwing the bottle away. And

so they started giving me mustard and trying to make me throw the pills back up from my stomach.

Q: So this was a suicide attempt on your part?

A: Yes.

Q: Why did you feel that you had to commit suicide?

A: Same old thing except it was just worse. It seems like I was in deeper and I just didn't know how to get out.

Q: I'd like to focus, if we may, on the date of October 29th, 1978; that was a Sunday, was it not?

A: Yes, it was.

Q: What happened? Could you relate what occurred early in the day that day.

A: Well, we had all got up, I fixed breakfast for the boys, and we got dressed and prepared to go shoping to get me a pair of slacks and a couple of pair of pants for the boys.

Q: When you say we, who are you referring to?

(319)A: The boys, me and Kareem.

Q: Did you go shopping?

A: Yes, we went out to Eastland Shopping Center, and while I was out there I lost my wallet.

Q: What was contained in that wallet, if anything?

A: Kareem's money, money order to pay the telephone bill, a little bit of grocery money and my charge plates and identification.

Q: When you say Kareem's money, what do you mean --

A: His cop money, the money he needed to get his fix with.

Q: Did you tell him that you lost the wallet?

A: Yes, I told him.

Q: And what was his reaction?

A: He was real upset, you know, because like he didn't have his cop money and that was it that I had lost in my wallet; and he was upset and like he tried to calm himself down thinking that maybe my wallet was still at home, that maybe I hadn't put it in my purse. And so we left there and we went back to the house and we looked for the wallet and the wallet wasn't here. And then he really got mad because he knew it wasn't around and that he didn't have

his cop money. And he was already sick.

Q: Did you attempt to recover that wallet?

A: Yes, I've kept constantly calling out to Eastland Security trying to see if the wallet had been turned in, and you, know, (320) just kind of like hoping that somebody had just turned it back in. I think the last time I called was about four o'clock, just before the mall was to close up, and they says it hadn't been turned in.

MR. KRISCIUNAS: Objection, hearsay.

THE COURT: Mr. Walker?

MR. WALKER: I'll withdraw that.

THE COURT: Sustained.

Q: (By Mr. Walker) Did you make attempts then to replace the money that Kareem needed?

A: I had to.

Q: What do you mean you had to?

A: Nobody in here really knows how he was like when he was angry, you know, but he was really upset because, like I said, he was getting real sick and he was hurting and he was getting, you know, like he was getting all uptight about it. So I called my brother and he said --

Q: What's your brother's name, please?

A: Clarence Jackson. he said he didn't have it because he had to pay his house note. I tried

to call my father-in-law but he wasn't there. And then --

Q: What is his name, please?

A: Reverend Charlie Marsh.

Q: Did Kareem suggest any ways that you should get that money?

A: He said I was going to have to borrow the money because he (321) didn't have any way of getting any money. And so he just kept on talking, kept on hounding at me to call other people. Most of the people I called, it was Sunday afternoon, you know, and they were out. So we were just sitting there and he said, "What about Ollie?" And I said, "What about her?"

Q: When he said, "What about Ollie," who did you think he was referring to?

A: He was referring to Ollie Scott.

Q: Go on.

A: And I asked him, "I says, "What about Ollie?" And he says, "Ollie has lent you money before, she'll lend you money this time," you know. And I said, "I already owe Ollie a hundred dollars and I'm not going to go over there and ask for no more money," you know. And he said I was going to go ask her and he was going to go with me to make sure I did, so I didn't come back with no little bald-assed lie about she didn't have it or she said no.

Q: So did you leave your house to go borrow this money from Ollie Scott?

A: Yes, we left the house.

Q: Who left the house?

A: Well, I had sent my boys down the street; they were invited to a Halloween party and they were down the street. So Kareem and I left the house.

Q: And did you go straight to Ollie Scott's house?

(322)A: No, we went by and picked up a friend of his.

Q: What happened when you arrived at this friend of his house?

A: He got out of the car and went up to get him.

Q: Then what happened?

A: I climbed in the back seat of the car and we drove off over to Ollie's house.

Q: Now, how many people were in the car at that point?

A: There were three.

Q: Did you hear any conversations in that car about any kind of robbery?

A: No, I was sitting in the back and the radio was on and the speaker was right in my ear. I knew that the(sic) were talking but what they were talking about, I wasn't even aware of it.

Q: So the three of you proceeded to where?

A: Over to Ollie's house.

Q: When you arrived did Ollie Scott let you in the house?

A: Yes, she let me in the house.

Q: Who went in the house?

A: Kareem and I.

Q: Did Ollie inquire as to why you were there?

A: Yeah, I told her that I came by to see if I could borrow some money.

Q: You heard the testimony of Cynthia Knighton and that she overheard a conversation to the effect that you were there (323) to pick something up? Do you remember that?

A: Right. After I -- it was right after I had asked Ollie to lend me the money that Cynthia and the baby came down the stairs and I was talking about picking up something, I don't remember the exact words, but I do remember saying something else about picking up something.

Q: What did you mean? What were you there to pick up?

A: I was there to ask for a loan and pick it up.

TESTIMONY OF CLARISSA MARSH

Q: Where were you seated when you first came into the house, or were you seated? What did you do when you first came into the house?

A: Well, when we first came into the house I was kidding with Ollie; she had a bruise like under her eye and I was sort of kidding her about it and I said, "Who popped you in the eye," and --

MR. KRISCIUNAS: Objection.

THE WITNESS: Anyway, Ollie sat down on the couch and I sat next to her.

Q: (By Mr. Walker) Now, you see this sketch. Miss Knighton testified from this sketch; it's a sketch of the premises on Mendota, Ollie Scott's

house. Now, this is the couch. Who was on this couch when you first came in?

A: Ollie was down at the end closest to the fireplace.

Q: So she was on this end of the couch?

A: Right.

(324) Q: Was there anyone else on the couch?

A: No. I was directly next to her.

Q: Then there was no one else --

A: Oh, yes, Cynthia Knighton and her son Koran were on the couch when they came downstairs. Cynthia sat next to me and the baby was right next to her.

Q: So that there were four people sitting on the couch?

A: Right.

Q: Where was Kareem Martin?

A: He was across the room in a chair.

Q: Would that be this chair?

A: Yes.

Q: So here's the couch, here's the chair?

A: Right.

Q: Was he seated in this chair?

A: Yes, he was seated.

Q: What happened next?

A: Ollie and I were still talking and then, like I looked -- I was talking to Ollie, she had turned her head, and I noticed the expression on her face and I looked at her and I turned around and here Kareem had pulled a gun out.

Q: What were you thinking when he pulled the gun out?

A: I didn't know what was going on. I sat there and he kind of like, you know -- when he pulled it out he kind of like fanned it a little bit and I just kind of got up and walked (325) over -- walked away from the couch and stood over there by the door.

Q: Why did you go over to the door?

A: I don't know. Like I said, I just kind of like stood up and went to the door.

Q: Did you have occasion to look out that door?

A: Yes, I looked out the door.

Q: Why did you look out the door?

A: Then I was looking to see where the car was.

Q: Why were you looking to see where the car was?

A: I don't know. I didn't know what was going on and I just looked out to see where the car was. I didn't know what to do.

Q: Did you feel free to leave at that time?

A: No.

Q: Then what happened, if you remember?

A: Somebody came to the door, the doorbell rang, Kareem asked who was at the door and I just turned around, something like a reflex or something to look out the door, and I saw that it was the friend that he had went to pick up.

Q: What were you thinking at that time?

A: I was thinking that maybe this was the way, like they wanted

to leave, that they had somewhere to go and it was taking too long and it would be an excuse, you know, to just go.

Q: So did you open the door?

A: Yes, I opened the door.

Q: And did that other man then come in?

A: Yeah, he came in.

Q: What happened after that, if you remember?

A: I don't know; it was just -- I know they went in the diningroom. And Kareem took Ollie upstairs, the friend, he followed up, and then they were right back downstairs.

Q: During this time did you try to escape or get out of the house?

A: No, I didn't try to get out of the house.

Q: Why not?

A: I was scared, I didn't know what to do. I didn't know whether to run or what. I was just standing there staring at the wall. I didn't know what to do.

Q: Did you have a gun?

A: No.

Q: Did you have any weapon at all in your hand?

A: No.

Q: Where were you during the time that the other people were walking around the house?

A: Standing at the door.

Q: Did you ever leave this area of the door?

A: No.

Q: What happened when the people came downstairs from the

upstairs and back into the livingroom, or did anything happen (327) in the meantime?

A: Well, I was standing at the door, I was just standing there looking at the wall, the wall directly in front of the door, and Cynthia Knighton jumped up and ran for the door, and I was standing there, you know --

Q: Where were you standing in relation -- where did she jump up from, first of all?

A: She was laying on the floor between the couch and the coffee table.

Q: She was lying right here?

A: Right.

Was there anybody else lying there?

A: Yes, her son.

Q: Which direction, if you know -- do you know which direction she was facing on --

A: She was facing towards the fireplace.

Q: So her head would have been in this direction away from the door; right?

A: Right.

Q: Did you have eye contact with her at all or could you see her?

A: Not that well; she was laying on the floor, and the way I was standing I could see, you know, her feet.

Q: Were you even watching her?

A: No, I wasn't paying any attention to her. I was just (328) standing there staring at the wall.

Q: What were you thinking at that time?

A: How I was going to get out of there.

Q: Now, she made a rush to the door; now what happened, if you remember?

A: I was just standing there, you know, and I was just staring at the door trying to figure out what to do, and the next thing I know she was right there at me, you know.

Q: Did you put your hands out?

A: I probably did, I don't know. It startled me when she -- you know, she was right there on me and I wasn't really paying any attention.

Q: Did you grab her?

A: I might have, I don't know. I think I did.

TESTIMONY OF CLARISSA MARSH

Q: Were you moving out this way at all?

A: No, I wasn't.

Q: You were standing at the door?

A: Right.

Q: Cynthia Knighton was moving which way?

A: Well, she just got up, I guess -- when I saw her she was standing right in front of me, still moving, you know.

Q: Did she have her son with her?

A: From what I remember, I think he was still sitting on the floor.

Q: Now, did there come a time -- okay she's at the door; then (329) what happened?

A: Kareem's friend came from out the diningroom and made her get back on the floor.

TESTIMONY OF CLARISSA MARSH

Q: Did you ever say anything to her?

A: No.

Q: Did you ever holler out to anyone?

A: No.

Q: Now, you say this other person came running out toward her; do you know where he was in the house at that time?

A: He was in the dingingroom.

Q: So he was in this area?

A: Yes.

Q: From where he was could you see him in the diningroom?

A: I could see, not his whole frame, but I could see part of him.

Q: In the meanwhile where was Kareem during this time?

A: I don't know.

TESTIMONY OF CLARISSA MARSH

Q: Did there come a time when Kareem came back into the livingroom or back into this area?

A: Right. He came from downstairs and he handed me a bag. I sat it down on the floor next to the end table.

Q: This end table?

A: Right.

Q And did you have any other parcels with you at that time?

A: What did you say?

(330)Q: Did you have any other parcels in your hand?

A: No, I didn't have anything in my hand. I did take a purse with me when I went in. It was sitting on the coffee table.

Q: Then what happened, if you remember?

A: After he came down and handed me this bag, he took Ollie into the kitchen towards the basement.

Q: Was there anything ever said upstairs by anyone about anyone being hurt, being shot and killed?

A: No.

Q: Then Kareem walked towards the kitchen area with Ollie Scott?

A: Right.

Q: What about the other people in the house, do you know?

A: His friend was in the same area he was in, around the dingingroom-kitchen area, and Cynthia and the baby were laying there on the floor.

Q: Did there come a time when they left?

A: Yeah, his friend came back and told them to get up and come and go down the basement.

Q: Did you watch them proceed out of the livingroom?

A: Yes, I saw them walk out of the livingroom into the diningroom.

Q: Then what happened?

A: I snatched up my purse and left.

Q: What did you do with the bag that they handed you with the (331) money?

A: I had put that on the floor when he first handed it to me, right on the floor next to the end table, and I just got my purse and left.

Q: Where were you going?

A: I don't know because I just had to get out of there. I didn't

know where the car was and I just figured maybe if I could get up to Grand River I could maybe catch a ride to get to my boys.

Q: So what happened when you left the house?

A: I went up Mendota towards Fullerton, across Fullerton, and after I crossed Fullerton I saw my car sitting there on the other side of Fullerton and Mendota.

Q: Then what did you do?

A: I got in the car and I drove off and I went and picked up my boys and then I just rode around. I didn't know where to go.

Q: Were the boys with you then?

A: Yes, they were.

Q: How long a period did you ride around?

A: For a long time. I rode around --

Q: Approximately what time was it that you picked up the boys; do you have any idea?

A: It must have been about maybe 8:00, 8:15; I'm not sure of the time exactly.

(332)Q: They kept asking questions and I told them to just be cool, you know, we're going to go home in a minute, you know. Mommy's got something she wants to do; she's got some thinking she wants to do. So eventually they went to sleep because they were tired; they had went to a party, you know.

Q: So you continued to drive around with the boys?

A: Right.

Q: Did you stay -- did you ever stay anywhere that night or did you drive around all that night?

A: Finally, I was so tired I stopped and I called my brother and asked him to meet me at the Crown Motel to get me a room.

Q: Why the Crown Motel?

A: Well, that's the motel my mother would stay at a lot of times when she came up to visit, and I knew which one she was talking about.

Q: Where is that located?

A: It's on Woodward Avenue.

Q: Did your brother respond to your call?

A: Yes, he came. He met me at the, you know, Crown Motel, and he was asking me --

MR. KRISCIUNAS: Objection, hearsay, to what he said.

(333) THE COURT: Sustained.

Q (By Mr. Walker) Why did you call him to check into a motel?

A: I told you I lost my purse, my wallet, and I didn't have any identification; I couldn't get a room there without identification. So I had to get him, you know, to get the room for me.

Q: So he came out then?

A: Right.

Q: Did he register you in a room?

A: Yes, we did.

Q: Did the boys stay with you then?

A: No, I sent them on with him because I didn't know exactly what I was going to do, and, you know, I just wanted some

time where I could just think for awhile.

Q: Did there come a time when you discovered -- when did you first learn that someone had been murdered at the Mendota address?

A: That early morning news on TV.

Q: And when you heard that did you know what they were talking about at that time?

A: I recognized the area they was talking about, so I just assumed that that was it, you know.

Q: Upon hearing that somebody had been murdered at this house what did you do?

A: I started making arrangements to get my boys somewhere so (334) that my mother could pick

them up so I could come and turn myself in.

Q: And how did you go about arranging to turn yourself in?

A: I had called Kareem's sister Jody, and if she knew an attorney, and so she called you for me on her "call waiting" phone, and we talked and made arrangements -- she made arrangements for me to come over to your house so that you could bring me in.

Q: And you did come over to my house, didn't you?

A: Yes, I did.

Q: And then what happened?

A: The boys were still with me --

Q: Now, the boys, you had dropped the boys off and you had given them to Clarence earlier. What

do you mean that they were still with you then?

A: Well, I had went back and got them because my brother said that he had some things that he had to do and as far as he knew, all it was about was that Kareem and I had had another argument and that I just didn't want to go back home. He didn't know that I was involved in this.

Q: Okay. About what time of the night was it that you came to my place, if you remember?

A: I guess it must have been about eight; I don't even know what time it was.

Q: Then what happened?

(335)A: Well, I was there and you called down and talked to

Sergeant Harris and told them that I wanted to turn myself in.

MR. KRISCIUNAS: Objection, hearsay.

THE COURT: Sustained.

Q: (By Mr. Walker) You were there while I was talking to him?

A: Yes, I was.

Q: So you heard me talking to him?

A: I heard you talking to Sergeant Harris.

Q: Then what happened?

A: You put the boys in a cab and sent them over to Josephine Martin's house so that they could be there for my mother to come and pick them up the next day when she got here.

Q: And then what?

A: Then you brought me in, you

brought me down to 1300 Beaubien.

Q: Clarissa, when you went to that address on Mendota on October 29th, did you have any intentions of robbing anyone?

A: No, I had no intentions of robbing anyone.

Q: Did you have any intentions of killing anyone?

A: No, I had no intentions of killing anyone?

Q: Did you know that Kareem Martin or anyone else was armed that day?

A: No, I didn't.

Q Have you seen your boys since that night that we put them in a cab?

MR. KRISCIUNAS: Objection, materiality.

(336) THE COURT: How is that material, Mr. Walker?

MR. WALKER: I'll withdraw the question, Your Honor.

Q: (By Mr. Walker) You've been incarcerated in the Wayne County Jail since that time?

A: Yes, I have.

MR. KRISCIUNAS: Objection, your Honor. The only purpose in that is to elicit sympathy from the Jury for this witness. There is no materiality; it has nothing to do with the crime itself or the reasons why the crime was committed. It has no other reason but for that purpose, to try to get sympathy.

THE COURT: Sustain the objection.

MR. WALKER: I have no more questions at this time.

TESTIMONY OF CLARISSA MARSH

MR. KIRISCIUNAS: Your Honor, I think that my cross-examination might be rather lenghly(sic). I think we are close enough to go to lunch.

THE COURT: I was thinking that, also, Mr. Krisciunas.

THE COURT: Ladies and Gentlemen of the Jury, at this time the Court will take a lunch recess. I'll ask you not to discuss the case among yourselves and be back at two o'clock.

(Whereupon, at 12:19 o'clock p.m., Jury was excused from courtroom and luncheon recess was taken.)

(337)

AFTERNOON SESSION

2:15 o'clock p.m.

THE COURT: Gentlemen, anything prior to beginning?

MR. KRISCIUNAS: No, your Honor.

MR. HILL: No, your Honor.

MR. WALKER: No, your Honor.

THE COURT: Very well.

(Whereupon, the Witness Clarissa Marsh resumed the stand and testified further upon her oath as follows:)

THE COURT: Miss Marsh, you're still under oath.

(Whereupon, at 2:16 o'clock p.m. Jury returned to courtroom.)

THE COURT: Will Counsel stipulate that all the members of the Jury are present and their respective places?

MR. KRISCIUNAS: The People so stipulate, your Honor.

MR. WALKER: Defendant Marsh so stipulates.

TESTIMONY OF CLARISSA MARSH

MR. HILL: Defendant Williams so stipulates.

THE COURT: Thank you.

You may proceed.

CROSS EXAMINATION BY MR. KRISCIUNAS:

Q: Miss Marsh, you are living on Mendota; is that right?

(338)A: No, I live at 14287 Mark Twain.

Q: I'm sorry. How long have you been living at that address?

A: About three years.

Q: Three years?

A: Right.

Q: And during the last year or so Kareem had moved in with you; is that correct.

A: That's correct.

Q: What kind of a house did you live in?

A: I live in a two-family flat.

Q: There was another family who lived upstairs.

A: Yes, there was.

Q: And you lived downstairs?

A: Correct.

Q: That wasn't your house, was it?

A: My mother had bought the house for me; we just hadn't had the deed changed over into my name.

Q: Isn't it true that you were renting there?

A: Well, you can call it renting but I didn't have to pay any rent. I just took the rent from the upstairs flat and paid the house notes with it.

Q: Now, you'd known Ollie Scott for how long?

A: I guess maybe two years.

Q: Where did you meet her first?

A: We used to work together.

Q: Where did you work together?

(339)A: In the numbers office.

Q: Where is that located?

A: All over the city.

MR. WALKER: I'll object, your Honor, it's not relevant.

MR. KRISCIUNAS: It just goes to the credibility of the witness, your Honor.

MR. WALKER: Well, it may involve a question, or some other legalities here.

THE COURT: I'll sustain the objection.

I believe the answer was several places around the city, wasn't it?

MR. KIRISCIUNAS: Right. I'll withdraw that question, your Honor.

Q: (By Mr. Krisciunas) But you worked with her, is that correct?

A: Right.

TESTIMONY OF CLARISA MARSH

Q: Did you ever work with her at her house?

A: No, I didn't.

Q: What type of work did you do? Were you working for her or with her?

A: With her.

Q: What type of work did you do with her?

A: We just ran up the tickets for the day and paid hits.

Q: And Mrs. Scott was still in numbers; isn't that right?

(340)A: Yes.

Q: And in October of '78 were you still running numbers with her?

A: No, I wasn't.

Q: When did you stop?

A: It was around April or May.

Q: Of 1978?

A: Yes.

Q: And you said there came a time when you started borrowing money from people; is that correct?

A: That's correct.

Q: Did you ever borrow money from Clarence Jackson?

A: Yes, I borrowed money from him.

Q: Is he your brother?

A: Yes, he is.

Q: Is he in court today?

A: He's not in the courtroom right now, no.

Q: He's in the building today; is that correct?

A: Yes.

Q: How long had Clarence Jackson been living in the city?

A: He's been here maybe five or six years.

Q: Did you borrow money from any other relatives?

A: Yes, I borrowed money from my father-in-law.

Q: What's his name, please?

A: Reverend Charlie Marsh.

(341)Q: Is he here today?

A: He's in the building, yes.

Q: Did you borrow money from anybody else?

A: I borrowed money from my mother.

Q: Is she here?

A: She's in the building.

Q: What's her name, please?

A: Elizabeth Jackson.

Q: When did you first start borrowing money from them?

A: Shortly after I stopped working.

Q: When did you stop working?

A: It was around April or May. I don't remember which month it

was but it was probably around the last of April or the first of May.

Q: From April or May of '78 until October of '78 you hadn't worked; is that correct?

A: No, I was on ADC.

Q: Mr. Martin, was he working?

A: He worked off and on.

Q: Were there any other relatives that you borrowed money from?

A: I tried to borrow money from my sister-in-law.

Q: What was her name?

A: Her name is Anita Moore.

Q: The period of time that I'm talking about is sometime after April of '78.

A: Right.

(342)Q: Did you ever borrow money from her?

A: Well, she has tried to get the money that I've asked for.

Q: Is she present in court today?

A: Yes, she's in the courtroom.

Q: Any other relatives?

A: My ex-husband.

Q: What's his name?

A: Ronald Marsh.

Q: Is he in court today?

A: Yes.

Q: In the courtroom or outside?

A: He's in the courtroom.

Q: You say he's in the courtroom --

MR. WALKER: Your Honor, I'm going to object. I don't understand Counsel's questions about whether they're in court or not. If he wants me to disclose who my witnesses will be, I'll be glad to do that. Whether or not these people are in or out the courtroom or in

or out of the building is not relevant. If he's trying to find out which witnesses I'm going to call, I'll be glad to tell him which witnesses we're going to call.

MR. KRISCIUNAS: Your Honor, if I could respond, I simply wanted to find out whether those people are available should we want to call them, also. You know, it's not just the Defense's case; we have an opportunity for rebuttal, and I have that opportunity -- I should get that opportunity to determine whether these witnesses are available should we decide to call them.

MR. WALKER: For the State's information, your Honor, every one of those people is present somewhere in the building and I would be glad to produce any one of them that the State so desires.

THE COURT: Under the circumstances, I'm going to overrule the objection. There is a certain amount of relevance to it.

MR. KRISCIUNAS: Thank you, your Honor.

Q: (By Mr. Krisciunas) Now, I think you testified that sometime in June of 1978 you attempted to commit suicide; is that correct?

A: Yes, that's correct.

Q: Prior to that time you had been borrowing money from your relatives?

A: Yes, I had been borrowing money.

Q: And the first time that you had learned about Kareem's drug problem was in June of 1978?

A: Yes.

Q: But you were borrowing money prior to June of 1978?

A: Right.

Q: Is that correct, yes or no?

A: Yes, that's correct.

(344)Q: And you continued to borrow money after you learned about his problem; is that correct?

A: That's correct.

Q: And who did you tell, if you did tell anyone, about his problem?

A: I didn't tell anyone.

Q: In fact, when you borrowed the money you always told your relatives that you needed the money for your children, the boys?

A: Yes.

Q: After you said you asked Kareem to leave; isn't that true?

A: Yes.

Q: And you said you asked him to leave three or four times; isn't that true?

A: Yes, I did.

Q: And he never left; is that correct?

A: No.

Q: Did you tell your brother that you asked Kareem to leave and he wouldn't leave?

A: To get him hurt for what? I thought I could handle him, you know.

Q: You were afraid that you'd get your brother hurt; is that correct?

A: You know --

Q: Is that correct?

(345)A: Yes, that's correct.

Q: And would that be because you knew that Kareem carried a weapon of some kind?

A: I knew he had a gun, yes.

Q: What kind of a gun was it?

A: It's a long-barrelled black gun.

Q: Did he only have one?

A: That was the onliest one I ever saw him with. He might have had another one, I don't know.

Q: Is that the same gun he had on October 29th, 1978, during the time of the holdup?

A: Yes, it is.

MR. WALKER: Objection, your Honor, I believe the testimony was that Kareem had a silver gun.

MR. KRISCIUNAS: I'll leave that for the Jury --

THE COURT: I'll overrule the objection.

MR. WALKER: But your Honor, that's a conclusion --

THE COURT: Your objection is overruled.

Q: (By Mr. Krisciunas) Is that the same gun that he produced in the livingroom on october 29th, 1978?

A: It was one of the guns in the house, yes.

Q: Your home was on Mark Twain; is that correct?

A: Yes.

Q: And Ollie Scott lived over on Mendota, isn't that true?

A: That's true.

(346)Q: In terms of distance, in terms of miles or blocks, how far is that away -- how far is your house from Ollie Scott's?

A: A mile or so, I don't know exactly.

Q: More than a mile or less than a mile or you're not sure?

A: I'm not sure.

Q: Would it be fair to say that it's about a mile?

A: I think so.

Q: Now, I'll ask you to take a look at People's Exhibit Number Ten, which is a photograph; do you recognize that photograph?

A: Yes, I do.

Q: Whose pictures appear in that photograph?

A: Myself, Kareem and my babysitter.

Q: Do you know what her name is?

A: Yes.

Q: What?

A: Karen Jasper.

Q: Do you know where it was taken?

A: It was taken at the Latin Quarter on East Grand Boulevard.

Q: Do you know when it was taken?

A: No, I don't know exactly when it was taken -- it had to be cold because I had on my belted suit -- so it had to be kind of cool outside, but I don't know --

Q: How did you come into possession of this picture? This is your picture, isn't it?

(347)A: Right.

Q: How did you get possession of it?

A: Bought it. It was taken at the club.

Q: Do you remember about when that was?

A: No, I don't. Like I say, it was getting cold outside because the suit I had on was the belted suit.

Q: Did you go to the Latin Quarter a lot of times?

A: That was the first and only time that we'd ever been out together.

Q: I'm sorry?

A: I said that was the first and onliest time that we'd ever been out together like that.

Q: So you'd only been to the Latin Quarter one time in your life; is that correct?

A: Yes.

Q: Did you have a good time that night?

A: Not really.

Q: You had a bad time?

A: I was trying to -- like he came there, I was already there with my babysitter, and he came after he found out where I was.

Q: And was there any kind of an argument there?

A: Not there, no.

Q: You bought the picture?

A: Yes, I bought the picture.

(348)Q: Does it refresh your memory at all, now that you've said that you went there and you remember going there with your babysitter, that it was the only time that you'd been there and you remember that Kareem came there --

MR. WALKER: Objection, your Honor, I don't see the relevancy about this questioning about the Latin Quarter.

MR. KRISCIUNAS: I think it is relevant, your Honor. I think she can testify as to the date, now that she's given us more information on that. Maybe it's coming back to her and she remembers more details.

MR. WALKER: What's so relevant about the date? I see no relevance at all in the whole thing, and that's why I've objected.

MR. KRISCIUNAS: I think it could be relevant, your Honor.

THE COURT: I'll overrule the objection.

Q: (By Mr. Krisciunas) How long did you stay there?

A: Maybe an hour or two.

A: Now, you've remembered all those details about Kareem coming there after you got there first; is that correct?

A: That's correct.

Q: And you remember your babysitter being there; is that correct?

A: That's correct.

Q: You remember that that was the only time in your life that (349) you'd been there at the Latin Quarter; isn't that true?

A: That's true.

Q: Now, knowing all that, is your memory refreshed at all as to when that occurred, whether it was in October of 1978? Could it have been in October?

A: I can't tell you exactly when it was. I know it was during the time when it was cool outide because I did have to wear a coat. I don't know what month it was. I know there was

a particular group that we had went to see but I can't remember the name of the group.

Q: Let me ask you this then: Was Kareem already living with you when he came there?

A: Yes, he was.

Q: Had you known about Kareem's drug problem when he came there to see you?

A: Yes.

Q: So that means that it was at least after June of 1978; isn't that true?

A: Definitely true.

Q: And when this photograph was taken had you already attempted suicide?

A: Yes, I had.

Q: And that was in June of 1978, you told us, right, the first time?

A: Right.

(350)Q: then you tried to commit suicide again a second time; is that true?

A: Right.

Q: Do you remember what month that was?

A: That was in October.

Q: October of '78?

A: Yes.

Q: That was shortly before the incident on Mendota?

A: Yes.

Q: Okay, you tried to commit suicide a second time; is that true?

A: That's correct.

Q: And in relation to the second time you tried to commit suicide, was this picture taken before or after that?

A: I tnink it was before.

Q: Sometime before this incident on October 29th, and sometime before you attempted to commit suicide?

A: Right.

Q: Would it be fair to say that it might have been sometime in September of '78 that this photograph was taken at the Latin Quarter.

A: It's possible.

Q: You're positive, though, that it was after June of 1978, because that's the first time that you learned about his drug problem and that's the first time that you attempted to (351) commit suicide?

A: Yes, I'm sure that it was after June.

TESTIMOONY OF CLARISSA MARSH

Q: Thank you. Now, on October 29th, 1978, was that a Sunday?

A: Yes, it was.

Q: And on that Sunday you got up and went shopping at Eastland; is that correct?

A: That's correct.

Q: Did you go shopping alone or with someone else?

A: I went with my boys and Kareem.

Q: And during the course of your shopping there you lost your wallet?

A: Yes, I lost my wallet.

Q: And in your wallet there was some money; is that correct?

A: Yes, that's correct.

Q: Approximately, how much cash was there in your wallet?

A: Close to a hundred dollars.

Q: And you lost some credit cards; is that correct?

A: That's correct.

Q: You lost some money orders or bills?

A: One money order and a bill.

Q: How much was the bill for?

A: Eighty dollars.

Q: What was the bill for?

A: It was a telephone bill.

Q: That was an eighty-dollar phone bill for one month, the month (352) of October?

A: No, it wasn't; it was for several months. He had gotten behind on the telephone bill and it was what he needed to keep the phone on.

Q: When you lost this purse where was Kareem -- the wallet?

A: He was at the shopping center with me.

Q: And when you discovered that you lost the purse was Kareem by you?

A: Yes, he was.

Q: Did you tell Kareem that you lost your wallet?

A: It was evident because I had to go in the purse and get the wallet out to get the money to use to pay for the purchases.

Q: When he realized that you didn't have your wallet he got upset; is that correct?

A: Yes.

Q: And you were upset too because of all the money that you had lost?

A: Yes.

Q: You lost at least a hundred dollars?

A: Yes.

Q: Plus a money order for eighty dollars?

A: Right.

Q: Plus all those charge cards?

A: Right.

Q: Plus your identification?

(353)A: Right.

Q: You were very upset about that; right?

A: I was upset about it, yes.

Q: So you went to the Security Department at Eastland and you reported to them that you had lost your wallet?

A: Yes, I did.

Q: And the reason you did that was because you wanted them to notify you if anyone turned in anything; isn't that correct?

A: That's correct.

Q: And you gave them all the information about where they could reach you?

A: I think so.

Q: And you told them that you came there and how much money you had lost; is that correct?

A: Yes. They told me not to worry about the money, I wouldn't get it back no way.

Q: You told them about the credit cards?

A: Yes, I told them about my credit cards.

Q: And did you fill out a report and sign your name to that report?

A: No, I didn't. They told me to wait until Monday and to come back and check again. I had called out there three or four

different times checking to see if the wallet had been turned in.

(354)Q: Did you see anybody write your name down?

A: No, not that I can recall.

Q: You weren't concerned about that?

A: I was very concerned about my wallet. I had been over -- I gave them my name and my telephone number, but like -- I mean as far as him -- he was --

Q: You didn't see him write down your name or your address ior anything?

A: I saw him pull a book off the shelf; I don't know if he wrote anything in the book or not. I'm not sure. I couldn't see the desk; that desk was too low.

Q: So you went back to your house on Mark Twain; is that correct?

A: That's true.

Q: And you needed some money now; is that correct?

A: Kareem needed some money, yes.

Q: Since you had lost some money, somehow it was you who needed the money to give to Kareem?

A: I guess you could say that.

Q: Well, did Kareem start making phone calls to borrow some money?

A: No, he didn't have anyone to borrow any money from.

Q: You were the one that started calling people?

A: That's correct.

Q: And did you call Clarence Jackson?

(355)A: Yes, I did.

(356)Q: Did you get any money from Clarence Jackson?

A: No. He told me his house note was due and he wasn't able to give me any.

Q: How much money did you need?

A: I just asked him for whatever he could let me have.

Q: How much money did Kareem need?

A: A hundred dollars.

Q: I think you said you called Reverend Marsh but he wasn't in; is that correct?

A: That's correct.

Q: You called several other people on October 29th and no one was home; is that correct?

A: They either weren't at home or didn't answer of(sic) didn't have it.

TESTIMONY OF CLARISSA MARSH

Q: How many times had you been over to Ollie Scott's house on Mendota?

A: Not very many times; maybe three times -- two or three times, I'm not sure.

Q: When was the last time before October 29th, 1978, that you went there?

A: The last time that I actually saw Ollie Scott was when she came by my house.

Q: My question was when was the last time --

A: I haven't been over to Ollie's house between June or October, if that's what you're saying, no.

(357)Q: You hadn't been over there between June and October of 1978?

A: Right.

Q: But she had been over to your place on Mark Twain; is that correct?

A: That's correct.

Q: Was Kareem Martin there?

A: Yes, she was.

Q: How Many times did she come over?

A: She had been over to the house two times.

Q: I'm sorry?

A: Two times.

Q: Since June of 1978?

A: Once since June and once before that.

Q: You hadn't been over to her place; is that correct?

A: Not that I can remember, no.

Q: But you testified that you borrowed money from Ollie Scott; that you borrowed $50, $100, $25 --

A: Those periods, most of it happened while we were working. The $100 I got from her last time she come to the house; she brought it by because she told me she was going out and she could drop the money off at my house so I wouldn't have to come over to her house.

Q: And you stopped working in April of '78; isn't that true?

A: Yes, I did.

(358)Q: So when you were borrowing money from different people to help Kareem with this drug problem he had, you didn't borrow any money from Ollie Scott; isn't that true?

A: One time, and that was when I got the $100 from her.

TESTIMONY OF CLARISSA MARSH

Q: So you left your house to go over to Ollie Scott's on October 29th; isn't that true?

A: That's true.

Q: Who drove the car?

A: Kareem drove the car.

Q: Now, between your place on Mark Twain, what are the big streets in that area?

A: Grand River, Linden, Schaefer.

Q: And Ollie Scott's house on Mendota, what are the big streets around there?

A: Wyoming and Grand River.

Q: So when you got in the car you drove directly to Ollie Scott's house; right?

A: No, we did not.

Q: Where did you drive to?

A: We went by to pick up a friend of Kareem's.

TESTIMONY OF CLARISSA MARSH

Q: Where did you drive to?

A: In Highland Park on Moss Street.

Q: Who did you pick up?

A: A friend of Kareem's

Q: Did you find out his name?

(359) MR. HILL: Your Honor, there's a question of law here.

THE COURT: Ladies and Gentlemen of the Jury, at this time I'll ask you to step into the juryroom for a couple of minutes.

(Whereupon, at 2:49 o'clock p.m., Jury excused from courtroom.)

MR. HILL: Hour Honor, I think the People are entering an area here that I don't think should be entered.

THE COURT: On what grounds, Mr. Hill?

MR. HILL: Well, we had a Brutten-type situation that could be involved in this matter, and I thought we had resolved it. And now he is, with a great deal of specificity, going into what I thought was a prohibited area because of the Brutten situation here. He has now asked this witness where they went to pick up a certain individual, that is unnamed up to now. She has given an address; he is now inquiring of her the particular name. I would presume that name, if forced to be given, is going to be Benjamin Williams.

THE COURT: Well, we can solve that just by asking her.

MR. KRISCIUNAS: In fact, the next question I am going to ask, is after she learned the name is "do you see him in court today?"

MR. HILL: I'm sure you are, then I will move for a mistrial.

(360) MR. KRISCIUNAS: As a matter of fact, may I cite the Court the case of People versus Brutten, and the reason for the Brutten Rule is that you can't introduce a statement from a person who is not testifying against a person who is a co-defendant, and the reason for that is because the defendant, through his attorney, the co-defendant through his attorney, is unable to cross-examine the person making the statement; and that's why you Bruttenize the statement. That's why in this case we took out all the references to Clarisa Marsh in the original statement because the declarant of that statement was Benjamin Williams, and he was not available for cross-examination. This witness, Clarissa Marsh, is available for

cross-examination by Mr. Hill for Benjamin Williams. he can cross-examine her at this point to determine whether or not, or how accurate her memory is of the events as to identification. If I recall, in this case the Defense has filed a notice of alibi. Fernando Williams was called as a witness for the Defense --

MR. HILL: That would be error, your Honor, if he entered that before a Jury, and he ought to know that.

THE COURT: Well, the Jury is not present, as the record will reflect. They have been excused.

MR. HILL: Yes. There has been no defense of alibi in this case and the People know it. There's law on that and you ought to know the law.

MR. KRISCIUNAS: The defense has been filed -- (361) I'm sure that

it's in the court file and I have a copy of it --

MR. HILL: There's a recent case on that. I don't have to use that as a defense.

MR. KRISCIUNAS: All I'm stating is that there is an alibi notice that has been filed that Fernando Williams was the person who was listed on that alibi notice, and Fernando Williams testified that at around 6:30 on October 29th, 1978, he was in the company of Benjamin Williams, and that -- and that at 6:30 Fernando Williams left, and when he left Benjamin Williams was still at the house and after that he didn't see him again. Now, am I to assume that Counsel is not going to request an alibi instruction, because I would like to know that right now since we had testimony from an alleged alibi witness.

MR. HILL: On what basis could I possibly ask for an alibi instruction?

THE COURT: Mr. Hill, are you informing the Court at this time that you are not using the defense of alibi? There is an alibi notice in the file.

MR. HILL: Your Honor, There's been no testimony of alibi in this case. Where is it in the record that there's been any testimony of any alibi?

MR. KRISCIUNAS: I think that is a question of fact, your Honor. I think that it's something --

MR. HILL: It certainly is a question of fact.

MR. KRISCIUNAS: I Think it's something that this (362) Court is going to have to make a decision on and whether or not to give an instruction on alibi knowing full well that an alibi notice has been filed and knowing full well that one of those witnesses has testified.

THE COURT: Let me say this: This is a decision that the Court will have for you by tomorrow morning. But at this time I would state that no mention of alibi should be mentioned in front of the Jury at this time.

MR. KRISCIUNAS: I did not intend to do that.

THE COURT: I did not understand you to say that you did intend to mention that. But just for the purposes of argument, you had indicated that Fernando Williams had testified presumeably as an alibi witness. Mr. Hill at that point indicated that Mr. Fernando Williams was not testifying as an alibi witness, that the defense was in fact not alibi. Now, with regard to the argument that you are making relative to the ability of Defendant Williams' attorney to cross-examine Miss Marsh, do

you have any further argument, Mr. Krisciunas?

MR. KRISCIUNAS: Yes, your Honor. I think that he can cross-examine her and go into all of the details. I think that when you look at the cases on severence, you look at People versus Hearst and you look at inconsistent defenses or you look at antagonistic defenses, I think that the posture of the defense has to be examined and I think at this stage I don't think there are antagonistic defenses because they are different defenses. (363) Her defense is mere presence, and the Defendant's defense, to my thinking at this stage, was that his defense was an alibi based on the testimony of Fernando Williams and the notice that I received. So I don't think that Counsel is harmed. I think that the key point is that Counsel can

cross-examine the witness and ask whatever questions he wants to see if she has identified the right person. At this stage we don't even know if the person she picked out was Benjamin Williams.

Don't you think that that's important? Maybe she would say that this is not the man who was there. That might be important to the Defendant's defense; we might have the wrong man in court. That's also a possibility. That's a question that should be asked. I'm sure that the Jury is thinking about that. And if she says that it is Benjamin Williams, that he was the one that got in the car, he can cross-examine. If she says that he wasn't the one that got in the car, then I can cross-examine further.

THE COURT: Mr. Hill?

MR. HILL: Well, your Honor --

TESTIMONY OF CLARISSA MARSH

MR. KRISCIUNAS: If I could just add one other thing. I think that her testimony at this stage is cumulative, also, if she identifies Benjamin Williams. Perhaps we should do an in-camera hearing right now to detemine whether in fact he was the man that got in the car. Maybe we're just wasting our breath arguing about this point. Maybe she's going to say that (364) that's not the man. I would ask to be able to ask the witness whether or not Benjamin Williams was in fact the man that they picked up in Highland park on October 29th, 1978. I would ask permission to ask that question of the witness, especially out of the presence of the Jury. I would think that it would do no harm.

THE COURT: Let me say this to you: This discussion has come up because

of the fact that just as you were about to ask that question Mr. Hill made an objection, which I was placed in the position of having to rule on. It is the type of objection that would have to be made outside the presence of the Jury, and I was going to allow Mr. Hill an opportunity to respond to your argument which you had entered into, perhaps a little prematuredly, but with provocation as a result of Mr. Hill's statement relative to the anticipated questions you were about to ask.

The Court at this time is in agreement with you, Mr. Krisciunas, as far as not knowing what the witness is going to say, because the argument could be rendered mute by the answer. So I think at this time the best way to proceed would be for you to ask the question, at which point Mr. Hill could

renew his objection. You have already made your argument, and then Mr. Hill could make his argument.

MR. KRISCIUNAS: Yes, your Honor.

THE COURT: So we can proceed.

(365)Q: (By Mr. Krisciunas) Miss Marsh, on October 29th you went to an address in Highland Park with Kareem to pick up somebody, a friend of Kareem's; is that correct?

A: That's correct.

Q: Did you find out that person's name?

A: Yes.

Q: What was the person's name?

A: Benjamin Williams.

Q: Do you see Mr. Williams in court today?

MR. HILL: Well, this is what I

--

THE COURT: Just a minute, Mr. Hill, she hasn't indicated whether or not she does.

MR. HILL: All right.

THE COURT: Would you answer the question, Miss Marsh, please.

THE WITNESS: Yes.

Q: (By Mr. Krisciunas) Would you point him out, please. What is he wearing?

A: Burgandy pants and white shirt.

MR. KRISCIUNAS: Let the record indicate that the witness has identified the defendant, Benjamin Williams.

I think we can continue with the argument, your Honor.

MR. HILL: This is what I anticipated; that's why I arose at the time.

(366) THE COURT: I think your objection might have been premature to the question but I think it was proper because the Jury was present and would have heard the answer.

MR. HILL: I think People versus Hearst speaks to this particular point. And if may, I would like to quote from part of it. I think the Court said in that case that the tendency of the testimony -- and I would relate that word to the testimony in this case, as the Court did in the first case -- the tendency of the testimony reads as to accuse the other. The Court went on to say that the State is required to avoid, and I would quote again, pitting one defendant against the other. And I think that's exactly what we have here, when the Prosecutor, in order to obviously solidify his case against the

co-defendant -- when he asks the witness the specific address where she went along with another party, and then when he pursued that further and has gone into the record here, but out of the presence of the Jury, who that individual was, and the witness has testified that the party was a Benjamin Williams, and pursued it further by identifying Benjamin Williams, the Defendant in this case, I think clearly in that instance the Brutten type situation that the Court had in mind is on all fours that we have here. We certainly didn't go through all the very careful procedure of blotting out certain remarks allegedly made by one Benjamin Williams with regard to this witness, but for the rule, as I understand it in the Brutten type situation, and I would say here that my co-counsel was very careful in his direct examination (367) to avoid

the pitfall that I think we've fallen into, or are about to fall into if this type of cross-examination is permitted; that there is no right to force Benjamin Williams to take the stand and to have to defend himself in any form or manner, and the result of this type of tactic, if I might use that term -- and i don't use it disparagingly -- would be to force us into proceeding in a manner that is inconsistent with the right of this Defendant to take the stand or to refuse to take the stand. And since he has exercised that right and refused to testify in his own behalf, to allow this procedure to be followed, would be tantamount for him to take the stand and defend himself under circumstances where the rule of law is to the contrary; and I would have no alternative, if the People are permitted to pursue this matter further -- I think damaging -- I think

damage has been done at this point -- but certainly a full damage would occur if the witness is asked to respond to the question that hasn't been asked in the presence of the Jury to such an extent that I would have to ask the Court to declare a mistrial.

THE COURT: Any thing further, Mr. Krisciunas?

MR. KRISCIUNAS: Yes, your Honor, if I might respond. I'm sure Counsel is aware that when a statement is Bruttenized, references in the statement to co-defendants must be deleted. However, and for the reason that the declarant is available for cross-examination by the co-defendant's attorneys. however, if the declarant does take the stand he can be questioned (368) regarding the entire statement, including references to co-defendants,

for the reason that at that stage he is subject to cross-examination.

What we have here is the reverse of that situation, while rather than having a written statement, which Brutten goes to, we have the witness herself being asked about the res gestae of what occurred. She too is subject to cross-examination by the Defense Counsel, and that's the exception; that's why we can go into all that.

THE COURT: Anything further?

MR. HILL: I don't want to prolong it, but that just isn't the rule of law, your Honor, that it ignores the rights of the co-defendant to testify in a case involving an allegation of a criminal act having been committed by him. That's what Brutten is all about, and that's why in some instances we sever defendants because if we don't the Court

can't protect the defendant when there's an instance like this, and there's a possibility that that surely exists here. The testimony will come out which will force him to do an act which the law doesn't require him to do and which under these circumstances he has elected and desires not to testify in his own behalf.

MR. KRISCIUNAS: People versus Hearst talk about the defendant's pointing the finger at themselves. I'm sure the Court is familiar with the situation in People versus Hearst where the People's theory was, well, we don't know which one of the (369) two defendant's committed the homicide, but it's got to be one of the two. Why don't you, members of the jury, find out which of the two it is; and then both defendants were engaged in a finger-pointing contest where they placed

the blame on each other. And they said in that type of a situation a severence should have been granted because you can't have the defendants pointing their finger at each other.

Clarissa Marsh is not pointing the finger at someone else committing the crime. She does not deny that the crime occurred. She is admitting that the crime occurred, and she's saving merely that she had nothing to do with it, I was coerced into it. So there is not an antagonitic defense where she is pointing her finger at Mr. Williams, and Mr. Williams in turn takes the stand and says I was the one -- I didn't commit the crime, she was the one that forced me, or something like that, and that's not the type of situation that we have at all. That's why I think it's important about the notice of alibi because the Defense

position, to my mind, was that it was an alibi case and therefore, again, there's no antagonism between the defense of alibi and the defense of duress or mere presence.

MR. HILL: Your Honor, there is a recent case where the Court spoke clearly on the question of alibi, that people can't comment on that fact unless it's actually been put in. There's been no alibi in this case. But what you say of course would simply ignore the testimony of Cynthia Knighton. As (370) I recall her testimony, I think she testified -- I'm sure the Jury hears -- about the possibility of three people being involved in this particular case, and certainly one of them being the Defendant Benjamin Williams. If we view that testimony in light of what you're going to bring out here, I don't see how

you can involve that which I'm arguing here. It would be to ignore completely the testimony of Cynthia Knighton.

MR. KRISCIUNAS: If I might comment on the case that Counsel cites about the alibi, that's a case where the defense filed a notice of alibi and then the prosecutor introduced the notice into evidence and then argued to the jury that they filed a notice of alibi, where are those alibi witnesses. I'm not doing that at this stage. I don't intend to do that, if the Jury is not going to be instructed on alibi.

THE COURT: Well, I do have before me a notice of alibi.

MR. HILL: You certainly do, your Honor.

THE COURT: Filed by you on February 20th. The alibi witness's name is Fernando Williams.

MR. HILL: But there's no requirement at all that I use that alibi, and the court has spoken to that. There's no requirement at all.

THE COURT: Since you say that at this time alibi will not be a defense, the Court will rule that no mention of alibi or mention of the notice of alibi that was filed with the (371) Court shall be made in the presence of the Jury during the course of the trial or during argument.

Relative to the motion regarding the testimony of the witness Clarissa Marsh, as it relates to Benjamin Williams, the Court being familiar with the Brutten case recalls the facts of that case in which one defendant made a statement which inculpated the other defendant. The defendant that made the statement did not take the stand, thus it

completely eliminated the co-defendant's right to confront his accusers and to cross-examine witnesses against him. For that reason, the Court reversed Brutten, and that is what has become known as the Brutten rule and it has called for the so-called Bruttenizing of admissions, confessions or other statements of co-defendants in joint trials.

Now, this Court is of the opinion at this time that the Brutten question, since Brutten dealt with a written confession, would go to the right of Clarissa Marsh to confront Benjamin Williams and cross-examine him, had she been implicated in this statement. That problem does not exist here. The question that is being raised at this time is whether or not Mr. Williams' right of confrontation and cross-examination is in jeopardy because

of statements that may be made by his co-defendant, Clarissa Marsh, and whether or not, as in the Hearst case, it would become a finger-pointing and lead the Defendants to prove to the Jury who did what.

(372) I do not see that as a problem in this case, either, because of the testimony that is on the record. Because of the testimony that is already on the record from Miss Marsh, you have made a motion for a mistrial; that motion is denied because I'm not convinced that it is such a situation that would call for a mistrial or any prejudice to the right of Mr. Williams.

I will say this to you, though, Mr. Hill; I will not have a closed mind on it. If at some future date you would wish to renew the motion and show me some compelling reason for granting it or to

reconsider it, the Court would do that. But at this time I feel that the Prosecution can cross-examine Miss Marsh relative to who that third individual was that she's already testified to and the things that were done by the third individual, since she has testified as to what the third individual did on direct examination, but not mentioning that person by name. And you are also present in court capable of cross-examining Miss Marsh and thus protecting the rights of Mr. Williams relative to his right to confrontation and cross-examination.

So the motion to limit the Prosecution's cross-examination is denied as is the motion for a mistrial at this time.

Mr. Walker?

MR. WALKER: Your Honor, then what happens in the situation of course

is that we've got the Hearst situation with Miss Marsh, and that's what I raised, and now she has to (373) face -- pursuant to your denial of his motion, then she's going to have to face cross-examination from the State and from her co-defendant, and this is exactly the situation in Hearst. And I have already put my motion on the record several times for severence in this case, and this is exactly what I contempled when I brought that motion initially, and I kept renewing it and kept renewing it and kept renewing it. So for the record, I join Mr. Hill in his motion and I renew my motion again.

THE COURT: I see a distinct difference between the Hearst case and the situation we have here, Mr. Walker, so your motion is preserved on the record but it is denied.

TESTIMONY OF CLARISSA MARSH

MR. HILL: May I just inquire how far will the People be able to go in this particular area? The door is open now, now how far could he go to this witness incriminating this Defendant with resting his case and not taking the stand? I can't see how my right or my option to cross-examine this witness will cure anything.

THE COURT: Mr. Krisciunas?

I have no idea how far the Prosecutor intends to go as far as cross-examination.

MR. HILL: Then may I impose an objection at this stage of the proceedings, so that we don't have the Jury jumping in and out, that from henceforth any testimony that is of and concerning Benjamin Williams, as coming from this witness through cross-examination by the People, I object

to as being a Hearst type (374) situation and cannot be cured by what the Court has said of my right to cross-examine the co-defendant; That's what I would be doing. She's a co-defendant.

THE COURT: That is correct.

Mr. Krisciunas?

MR. KRISCIUNAS: Finally, your Honor, I would indicate, as Mr. Walker said, that this is exactly the type of situation that he contemplated from the beginning by filing his motions to sever. I would indicate just for the record that at no point in time did he ever define the possible antagonistic defenses or possible inconsistencies, and it is at this time now in trial that the argument was made that she was merely present. I think that the original --

THE COURT: If I recall the original defense was the possiblity of insanity.

MR. WALKER: No, your Honor, that was never a defense in this case. I had her referred --

THE COURT: I may be wrong.

MR. WALKER: We had her referred for psychiatric evaluation and that was to have her evaluated for our own purposes I never mentioned that word. I think Mr. Kenny, when he was on the case, brought that possibility up and said well I want to have her examined, too. But those words never came from my mouth or my pen. And if Counsel will look at the original motion that I filed with this Court on December 27th, 1978, I clearly (375) set out the factors that I thought were comtemplated occurring at this trial. And therefore, I made my motion and that's all contained in my affidavit in that motion. And if Counsel doesn't have a copy of my motion I'll be

glad to give it to him. It should be in the file. Mr. Kenny was in the case at that time.

MR. KRISCIUNAS: Well, I've got the affidavit your Honor, and it states that the antagonism between the defendants' defenses seem to emerge in light of the following facts: Since both Defendants have no prior record and have been offered no reduced plea, it is likely that they will both take the stand in their own defense. On October 30th, 1978, Defendant Benjamin Williams made extra judicial statements in the form of a signed statement to the Detroit Police wherein he inculpates Defendant Marsh while seeking to exculpate himself. At the Preliminary Examination held November 9th, 1978, an eye-witness indicated that two out of the three of the alleged robbers led the shooting victims to the

basement of the house where they were all shot. Such factors have potential for adversely affecting the rights of Clarissa Marsh to a fair trial as follows: It pits one Defendant against the other. It subjects Clarissa Marsh to cross-examination by both the Prosecutor and the other Defense Lawyer. The conflicting testimony of the Defendants and the winesses coupled with the multi-count indictment will present a confusing picture to the Jury as to (376) alleged roles of the parties involved and the consequential culpability. The affiant is advising the Court of potential conflicts so as to aid it in its exercise of discretion in preserving the substantial rights of Defendant Clarlsa Marsh. These allegations are made from the affiant's personal knowledge, information and belief. Further Deponent sayeth not.

I submit to the Court that if that is not specifically stating what the antagonism is sufficiently to allow the Court to make a ruling on it -- and even though -- even if this is the alleged antagonism, it is not enough under People vervus Hearst to cause for severence. And I would ask the Court to deny the Defense motion for severence.

MR. WALKER: Your Honor, I would apologize to the State that my powers for foretelling the future are not exactly accurate, but I think the spirit of the cases is followed in this motion in that I at that time, in December, did the best I could to predict what I foresaw at that time as happening. And I believe that many of the things I did say have in fact come true. If I were a hundred percent correct I wouldn't bein (sic) this business.

TESTIMONY OF CLARISSA MARSH

THE COURT: Let me say this, Mr. Walker: I'm sure that you cannot look into the future and I'm sure that you acted in good faith. I don't even know why anybody would raise that even as part of a statement in regard to the motion. But at the time that you raised the motion for severence, later it (377) could have been predicted with more certainty what specific conflict there might be. While I'm still not convinced that there's such a conflict --

MR. WALKER: Well, I didn't know what the co-defendant was going to do. He's not going to tell me, "Well, I'm going to do this and I'm going to do that," because --

MR. HILL: May I say this, that as part of the defense of Benjamin Williams up to now is that he has not and is not involved in this. At a separate

hearing he has denied that the signature is his signature that is affixed to the statement that has been read into the record, and it's up to the statement that has been read into the record, and it's up to the Jury, not the Court, to determine, number one, whether he in fact made that statement, because if he didn't make that statement then there's no involvement of this particular Defendant in this particular crime, except the testimony of a particular witness, and the Jury has a right to believe or disbelieve a witness.

Now, to compound that and to permit this witness, a co-defendant, to implicate this Defendant, under the circumstances, has no other affect than to force this Defendant to take the stand, which he cannot do at the present time and defend himself; because his

defense is that "I am not involved in any of this." That's the defense, your Honor. There can be no other.

THE COURT: Well, my previous ruling stands. I believe my original question to Mr. Krisciunas was how far did (378) he anticipate going on cross-examination of Miss Marsh relative to the actions of Mr. Williams throughout this entire transaction.

MR. KRISCIUNAS: I really don't anticipate going into it that much more other than to perhaps some of the things that went on in the livingroom and the timing.

THE COURT: The Court is going to take a five-minute recess.

(Short recess.)

THE COURT: Are you ready to proceed?

MR. WALKER: Yes, your Honor.

TESTIMONY OF CLARISSA MARSH

MR. HILL: Yes, I'm ready, your Honor.

THE COURT: Mr. Krisciunas?

MR. KRISCIUNAS: Yes, your Honor.

(Whereupon, at 3:32 o'clock p.m., Jury returned to courtroom.)

THE COURT: Do Counsel stipulate that all the members of the Jury are present and in their respective places?

MR. KRISCIUNAS: The People so stipulate.

MR. HILL: Defendant Williams so stipulates.

MR. WALKER: Yes, your honor.

THE COURT: You may proceed, Mr. Krisciunas.

Q: (By Mr. Krisciunas) Miss Marsh, I believe that you were

in a car with Kareem and that Kareem was driving the car; is that correct?

A: That's correct.

(379)Q: You drove to Highland Park to an address on Moss; is that correct?

A: That's correct.

Q: You picked up a friend there; is that correct?

A: Correct.

Q: And I believe I asked you a question, did you find out that person's name.

A: Yes.

Q And could you tell us what his name was -- is?

A: Benjamin Williams.

Q: Do you see Mr. Williams in court today?

A: Yes, I do.

Q: What is he wearing?

A: Burgundy pants and white shirt.

KR. KRISCIUNAS: Indicating the Defendant Benjamin Williams.

Q: (By Mr. Krisciunas) Is this the same Benjamin Williams that you and Kareem Martin picked up -- is this the same man in court today?

Q: Yes.

A: Now, I believe that you drove over to the house on Mendota; is that correct?

A: Yes.

Q: And who got out of the car first?

A: Kareem.

(380)Q: Kareem and you?

A: Yes.

Q: Did Mr. Williams get out of the car, too, or did he stay in the car?

A: He stayed in the car.

Q: Was the engine still running to the car?

A: I think so.

Q: You went to the house; is that correct?

A: Yes.

Q: You got in the house and you talked to Ollie Scott; is that correct?

A: Yes.

Q: And there came a point in time when Mr. Martin, Kareem, pulled out a gun; is that correct?

A: Yes.

Q: Do you recall what he said when he pulled out the gun?

A: I don't think he said anything when he first pulled it out.

Q: Did you say anything after he pulled it out?

A: I don't know the exact words. He said something about somebody's brother or something.

Q: Would it be fair to say that he said something about somebody's brother getting killed?

A: Yes.

Q: And then a short time later Mr. Williams came into the house; is that correct?

A: Yes.

Q: And you let him into the house; isn't that true?

A: I beg your pardon?

Q: You let him into the house?

A: Yes.

Q: You opened the door and he came in; isn't that true?

A: Yes.

TESTIMONY OF CLARISSA MARSH

Q: This motel that you went to; the Crown Motel, do you know where that's located?

A: It's on Woodward in Highland Park.

Q: In Highland Park?

A: Yes.

Q: How close is it to the are(sic) in which Benjamin Williams was picked up on Moss?

MR. HILL: Materiality, your Honor.

THE COURT: Overruled.

Q: (By Mr. Krisciunas) Miss Marsh, this car that Kareem drove, what kind of a car was that?

A: '77 black Monte Carlo.

Q: Whose car was that?

A: It's my car.

TESTIMONY OF CLARISSA MARSH

Q: There came a point in time I believe you said that -- strike that. When you turned yourself in to the police, you turned your kids over to Josephine Martin; isn't that true?

(382)A: That's true.

Q: Who is Josephine Martin?

A: That's Kareem's sister.

Q: Where was she living at the time?

A: It's on Cloverlawn; I don't have the number.

Q: At that time you knew the address?

A: Yes, I did know the address at that time? I sent them over in a cab.

Q: To a particular address on Cloverlawn?

A: Right.

TESTIMONY OF CLARISSA MARSH

Q: Now, you are in the house and Mr. Williams comes in and I think you said there was a point in time when Ollie Scott was taken upstairs; is that correct?

A: Yes, she was.

Q: And Kareem took her upstairs?

A: Yes.

Q: And sometime later he came down and gave you a bag or some bags?

A: Yes, he gave me a bag.

Q: One bag?

A: Yes.

Q: Did he put that bag down here on the chart close to the lamp?

A: I was standing closer to the door so it would be on the outside of the lamp. He just set it down on the floor as (383) he came down.

TESTIMONY OF CLARISSA MARSH

Q: Then did there come a point in time when Kareem took out his gun, walked her towards the diningroom; is that correct?

A: Yes.

Q: And then she was out of your view; is that correct?

A: That's correct.

Q: And Mr. Williams, he was still in the livingroom at that time; is that correct?

A: I'm not sure whether he was in the livingroom or the diningroom.

Q: At any rate, Kareem walked out of your sight; is that correct?

A: That's correct.

Q: And Ollie Scott walked out of your sight?

A: That's correct.

TESTIMONY OF CLARISSA MARSH

Q: The only people in the livingroom at that time are you and Cynthia Knighton and Koran Knighton; is that true?

A: Are you talking directly after they came downstairs or when?

Q: I'm talking about when Kareem took Ollie Scott into the diningroom and after you couldn't see Ollie Scott anymore.

A: Right, the three of us were in the livingroom.

Q: By the way, you said that you were standing here and you were looking at the walls, staring at the walls; isn't that true?

(384)A: Yes.

Q: Which wall were you staring at?

A: This wall directly by the door with the TV set up against it.

TESTIMONY OF CLARISS MARSH

Q: Are you talking about this wall right by the door or this wall here --

A: We're talking about the wall between the livingroom and the kitchen.

Q: Somewhere over in this area?

A: Right.

Q: You're standing here watching this wall; is that right?

A: I was just standing there, yes.

Q: It was then that Benjamin Williams told Koran and Cynthia Knighton to go with him, too; isn't that true?

A: Yes.

Q: And they walked into the diningroom and out of your sight?

A: Yes.

Q: So the only person in the livingroom at that time was you; isn't that true?

A: That's true.

Q: So at that point you realized that this was your opportunity to get out of that house?

A: Yes.

Q: So you went over to the table where your purse was -- the table here?

(385)A: The table is much longer than what it's depicted on that picture.

Q: That table was in front of the couch; isn't that true?

A: That's correct.

Q: So you went from the area of the door to the table, picked up your purse and you went out which door?

A: The front door.

Q: Where you enter the house; is that true?

A: That's true.

Q: You were not walking around; correct?

A: No, I did not go walking around. I went south on Mendota towards Fullerton.

Q: When you got to Fullerton you saw your car?

A: No, I did not. I was headed towards Grand River to catch a hide(sic) to get home. And as I crossed over Fullerton to the other side of Mendota, as I was walking by, I saw the car sitting there.

Q: And you got in the car; is that correct?

A: That's correct.

Q: And you drove the car away; right?

A: Yes, I did.

Q: The keys were still in the car?

A: The keys were still in the car.

Q: You drove away and you said that the first thing you did was you drove over to see your children?

(386)A: I went to get my boys.

Q: You went and picked up your boys?

A: Yes.

Q: Drove around for awhile?

A: Yes, I did.

Q: Didn't know what to do?

A: No, I didn't.

Q: Needed time to think; right?

A: Yes, I did.

Q: Your boys were tired?

A: Yes.

Q: Then you got tired?

A: Yes.

Q: So you decided that you would call your brother?

A: Yes.

Q: You called your brother, Clarence Jackson?

A: Clarence Jackson.

Q: Told him to meet you at the Crown Motel?

A: Yes. I didn't have no identification and didn't have no money.

Q: You needed Clarence Jackson so that he could register you into the room?

A: Yes.

Q: You needed Clarence Jackson so that he could get you some money?

A: Yes, to get a room.

(387)Q: So you drove over to the Crown Motel?

A: Yes.

Q: Did you meet Clarence Jackson there?

A: Yes, I did.

Q: Did Clarence Jackson have some money?

A: Yes, he had a little bit of money.

Q: And did he register in his own name?

A: Yes, I did.

Q: And then you stayed in that room?

A: I did.

Q: Did your children stay?

A: No.

Q: Did you walk your children back to your brother's car?

A: They remained in the car. In fact, my brother and the kids

stayed in the car and I went up to the room. He gave me the key and I went upstairs to the room.

Q: Did you kiss them goodbye?

A: Yes, I did.

Q: The motel room you were in at the Crown Motel, did it have a television?

A: Yes, it did.

Q: Is that where you learned about the fact that there were some murders on Mendota?

A: Yes, it was.

Q: So you were concerned; isn't that true?

(388)A: I was sick to my stomach about the whole thing, you know.

Q: So you called the police to let them know about the fact that you knew what had occurred at that address; isn't that true?

A: No, it is not true.

Q: Instead, you called Josephine Martin?

A: Yes, I did.

Q: Had your brother come back to the motel?

A: No.

Q: How did you get your kids again the next day?

A: By cab.

Q: Why didn't you drive your car from the Crown Motel?

A: I was scared to get in the car; I didn't know if anybody had seen me, or not. I was just running around in circles.

Q: So you left the car, the black 1977 Monte Carlo, in the parking lot of the Crown Motel; isn't that true?

A: No, I did not leave it in the parking lot of the Crown Motel.

TESTIMONY OF CLARISSA MARSH

Q: Well, you just told us --

A: I told you I met my brother at the Crown Motel. I drove my car to the Crown Motel. My car was around the Crown Motel but I did not take it directly to the Crown Motel.

Q: I'm sorry, you left your car in the vicinity of the Crown Motel?

A: Yes, it was.

(389)Q: Did you tell your brother, Clarence Jackson, what happened on Mendota?

A: No, I didn't.

Q: You called Kareem's sister Josephine; is that correct?

A: Yes, I did.

Q: And you got the name of an attorney?

A: Yes, I did.

Q: And you took a cab over to Mr. Walker's house?

A: Yes.

Q: What did you do to the keys to the car?

A: Gave them to my brother.

Q: Mr. Jackson?

A: Yes, He had one set and I still had another set.

Q: Do you know where that car is now?

A: I believe it's sold.

Q: Do you know who sold it?

A: My mother.

Q: What's your mother's name?

A: Elizabeth Jackson.

Q: She's present in court; isn't that true?

A: She's out in the hall.

Q: Thank you.

I have no further questions.

MR. HILL: Nothing, your Honor.

TESTIMONY OF CLARISSA MARSH

MR. WALKER: I have nothing further.

(390) THE COURT: Thank you, Miss Marsh, you may step down.

(Witness excused.)

Supreme Court, U.S.
FILED
AUG 6 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1433

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1985

GLORIA RICHARDSON, WARDEN
Petitioner

vs.

CLARISSA MARSH
Respondent

ON WRIT OF CERTIORARI
TO THE SIXTH CIRCUIT COURT OF APPEALS

JOINT APPENDIX
VOLUME II

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PETITION FOR CERTIORARI FILED
FEBRUARY 24, 1986
CERTIORARI GRANTED JUNE 9, 1986

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PROSECUTOR'S CLOSING ARGUMENT

(434) THE COURT: Do counsel stipulate that all members of the Jury are present and in their respective places?

MR. KRISCIUNAS: The People so stipulate.

MR. HILL: Defendant so stipulates, your Honor.

MR. WALKER: Defendant Clarissa Marsh so stipulates.

MR. KRISCIUNAS: The People have no objection to excusing Miss Dickey because of the fact that she had to go to a funeral.

MR. HILL: Defendant Williams has no objection also.

MR. WALKER: We have no objection, your Honor.

THE COURT: It should be pointed out that it was agreed prior to this time.

PROSECUTOR'S CLOSING ARGUMENT

Mr. Krisciunas, are you ready to proceed with argument?

MR. KRISCIUNAS: Yes, your Honor.

Good morning, Ladies and Gentlemen of the Jury. First of all, I would like to thank all of you for your patience throughout this trial. As you know, many times you go back in the juryroom and probably wonder what we're doing out here. I assure you that we're working, that there are several matters that have to be taken care of out of the presence of the Jury, and we have been doing that every morning, and also in the afternoons when you haven't been able to see us.

The testimony is now over and the arguments (435) about to begin. Soon you will get the instructions from the Court on the law to be applied to this

case. The format of the closing argument is that I speak to you first, because I have the burden of proof in the case. After that, Mr. Hill will speak on behalf of Defendant Williams and Mr. Walker will have an opportunity to speak on behalf of Defendant Marsh. After they have argued to you, I get what is known as the rebuttal, the opportunity to speak to you a second time. And the purpose of that is to answer any questions that were raised by the Defendants, or to respond to certain arguments that perhaps I didn't raise in my closing argument.

Now, during the course of the trial if I did anything to upset any of you, I opologize(sic). I hope that you don't hold it against the case of the People.

The purpose of the closing argument is to narrow down the issues for you and to clarify some of the legal

matters, to summarize the testimony and give you our theories of the case to assist you in reaching a verdict, to assist you in your deliberations and to focus on the issues of the case.

The Court has the duty to instruct you on the law, and the Court will tell you about the different verdicts in this case.

Now, if you recall, when I read the Information, there were three charges in this case; two counts of First Degree Felony Murder, and one count of Assault With Intent to Murder. I (436) would like to read the Information again, reminding you that it is not evidence in this case. The evidence came from the witness stand. But it is important because it tells you what the People have to prove. We have to prove that on October 29th, 1978, at 12627 Mendota in

the city of Detroit, the Defendant Clarissa Marsh and the Defendant Benjamin Williams, while in the perpetration or attempted perpetration of a robbery, did kill and murder one Ollie Scott.

In Count II, while in the perpetration or attempted perpetration of a robbery did kill and murder one Koran Knighton.

Count III, did assault Cynthia Knighton with intent to murder with a certain weapon, to-wit, a hand gun.

Very simply, Count I talks about First Degree Murder, Count II is First Degree Murder, Count III is Assault With Intent to Commit Murder.

Now, the Court is going to instruct you on lesser offenses, and it's not unusual; it happens in every case. Taking a look at Count I -- let's look at Count III first. Count III is Assault With Intent to Murder. The Court will

not instruct on any lesser included offense other than Assault With Intent to Murder. Count I, charging First Degree Felony Murder, the Court will instruct you on the law as to First Degree Murder, the Court will instruct you on the law as to Second Degree Murder, the Court will instruct you on the law as to what an Armed Robbery is, and Armed Robbery will be what is known as the lesser (437) included offense to the crime of Felony Murder. Should you feel that there is insufficient evidence to show that either of the Defendants or both the Defendants lack the requisite intent to kill, but you are satisfied that they participated in a robbery, you could then find them guilty of robbery and find them not guilty of First Degree Murder or Second Degree Murder. Those would be your choices.

PROSECUTOR'S CLOSING ARGUMENT

In addition to the Armed Robbery, there are certain lesser included offenses to that crime; there is the crime of Assault With Intent to Rob While Being Armed, and the crime of Attempt Robbery Being Armed.

So in Count I you are actually going to have six possible verdicts. You can only return one verdict as to each Defendant on Count I. You may find the Defendants guilty -- and you can have different verdicts for each Defendant, too -- but you can find as to Count I, Defendant guilty of First Degree Murder, or guilty of Second Degree Murder, or guilty of Armed Robbery, or guilty of Assault With Intent to Rob Armed or guilty of Attempt Robbery Armed, or not guilty. That applies to both Defendants; you can find any one of those as to Count I.

You can do the same thing as to County II, with the exception that you are only going to get three possible verdicts in Count II. In Count II, we're talking about the killing of Koran Knighton. In Count I we were talking about the killing of Ollie Scott during the perpetration of a robbery of Ollie Scott. (438) so that's why the lesser included offense applies there.

In Count II we're talking about the killing of Koran Knighton during the robbery of Ollie Scott. You may find three possible verdicts: Guilty of First Degree Murder, guilty of Second Degree Murder, or Not Guilty.

As to Count III, as I told you, you can find the Defendants either guilty or not guilty of Assault With Intent to Murder.

You don't have to remember all of these because the Court's going to

give you a verdict form and the Court is going to instruct you on the law as to all of those crimes. And when you go into the juryroom, believe me, you're going to understand everything, because every jury that has ever sat before has been able to understand the law the same way, and I'm sure they came in with the same frame of mind that you did.

Now, as I told you, it's important to consider the evidence separately against each Defendant. And because the evidence must be considered separately, in fairness to each of the Defendants, I would like to argue separately.

First of all, I would like to talk about the Defendant Benjamin Williams. I told you in the opening statement that your job is really twofold. Your job is to determine first

of all whether Benjamin Williams was present, whether he was the man we claim was there.

Second, if you're satisfied he was there, what (439) crime is he guilty of, if any. I submit that the testimony has shown that there is no question that Mr. Williams was there. He was identified in the testimony of Cynthia Knighton and he confessed to being there to the police.

Then the next question becomes what is he guilty of? And I submit that the evidence is clear that he is guilty as charged. By that I mean that in Count I he is guilty of First Degree Murder, Count II he's guilty of First Degree Murder, Count III he's guilty of Assault With Intent to Commit Murder.

Now here the law of aiding and abetting is important. As I told you in

my opening statement, it's unnecessary that Mr. Williams to actually have pulled the trigger and fired the bullet that killed Ollie Scott. It's unnecessary for Mr. Williams to have pulled the trigger and fired the bullet that killed Koran Knighton. It's unnecessary, under the law of aiding and abetting, for Mr. Williams to have pulled the trigger and fired the shots that hit Cynthia Knighton, because the Court will tell you that all persons who aid, abet or assist another during the commission or attempt to commit a crime are just as guilty as the person who actually committed the crime.

I would like to give an example of a baseball team. When a baseball team wins a game, all nine players share in the victory, regardless of what role they participated in. In-fielders,

out-fielders, pitchers, catchers, designated hitters, pinch-hitters, pinch-runnders(sic), coaches and managers, they all have (440) different responsibilities; but when the game is over and they've won, they all won the game, regardless of whether they hit a home run or whether they struck out. The same thing applies in an armed robbery case, where teamwork is necessary and all the defendants have different jobs. For instance, there's one person that goes into a store with a gun and announces a holdup. There is a second person that doesn't have a gun, but he goes to the cash register and takes the money from the register. There's a third person that stands by the door and acts as a lookout to make sure that no one interrupts the robbery. And there's the first person that sits in the getaway car

to make sure that once the robbery is completed they can flee the scene. All four persons have important roles in the commission of the robbery. Should one of those persons fail in his role, the whole robbery may become incomplete; it might go down. That's why the law says that all who aid or assist or abet in the commission of a crime are equally responsible. They all share in the proceeds of the robbery. They all share in the guilt for the robbery and the responsibilities for the robbery when they are caught.

I'll talk a little bit about the crime of murder in Michigan. There are two degrees of murder; there's Murder in the First Degree and Murder in the Second Degree. All murder in Michigan is Murder in the Second Degree. The way that you get a crime of murder into Murder in the First Degree is by adding

(441) an additional element. If you have a murder committed during the commission of another felony, it raised the crime from murder in the second degree to murder in the first degree.

Murder is defined as having two elements. You are required to have -- a person who is charged with murder is required to have intended -- strike that. Murder requires two elements: First, the killing of a person; second that the person had malice.

Malice is defined as an intent to kill, or secondly, if the defendant knowingly created a very high risk of death to the victim, with knowledge that it probably would result in death.

I submit to you that when you look at murder, you require an unlawful killing. The testimony in this case clearly shows that there was an unlawful killing.

PROSECUTOR'S CLOSING ARGUMENT

You heard the testimony of Cynthia Knighton and the details of how the killing went down. You heard the testimony of the Wayne County Medical Examiner; he testified to the nature of the wounds and how the wounds were to the back of the head of Ollie Scott and to the back of the neck of Koran Knighton. There was testimony that the wounds were contact wounds, that there was soot from gunpowder. He indicated that the bullets were fired from one to two inches away. he indicated that it was not an accidental killing; that these were serious killings, intentional killings. They were not lawful killings and not excused (442) in any way.

Certain killings might be excused. For instance a soldier in war, during the course of battle, he kills the enemy. The police officer shoots a felon during the course of the commission of a

felony. A person acting in self-defense because he's being attacked by another and his life is in danger, these are lawful killings. These are excused.

I submit that in this case it is clear that we can't have that type of a killing. We have an unlawful killing.

So to summarize, the elements of Second Degree Murder are unlawful killing with malice, and to make it First Degree Murder we have to show that this unlawful killing with malice was committed during the perpetration of a felony. Before we can prove First Degree Murder, we have to show that a robbery was committed.

I submit that as to the Defendant Williams the testimony is clear that he assisted Kareem Martin in the perpetration and the commission of a robbery. You recall the testimony that when Kareem Martin came into the house

and after he pulled his gun, a short time later Mr. Williams came into the house. And after he made his comment about being so-and-so's brother, that's the first thing that he said, "Where's the money?" So it shows that when he entered his intent was to rob. When Kareem Martin took Ollie Scott upstairs, Benjamin Williams remained downstairs with Cynthia Knighton and Koran. Why did he do that? To assist (443) in making sure that they stayed downstairs. And then he too went upstairs, and then we have the circumstantial evidence of what happened upstairs. The room was ransacked. Take the photographs that we have introduced into evidence and look at those photographs.

You have the testimony of the police officers, the testimony of Cynthia Knighton, that when she came upstairs the

room was ransacked. When the man came downstairs they handed Clarissa Marsh a bag. I submit that that shows that the robbery was committed or at least attempted to be committed, and it was during the course of this robbery that the killings took place.

In addition to the testimony from Cynthia Knighton and the police officers about the circumstances of the robbery, we have the statement by the Defendant. He states that on October 29th, 1978, he was at his girl friend's house in Highland Park, and "I received a phone call from a friend of mine named Kareem Martin. He said that he had been looking for me and James Coleman, who I call Tom. He asked me if I wanted to go on a robbery with him. I said okay. And about 15 or 20 minutes later Kareem came by in his car. I got in the car and

PROSECUTOR'S CLOSING ARGUMENT

Kareem told me that he was going to stick up this crib, this place was a numbers house. Kareem said that there would be over $5,000 or $10,000 in the place. Kareem said that he would have to take them out after the robbery."

I submit that this shows that in fact Mr. Williams intent in going to that home as to in fact commit a robbery. So (444) I submit we've satisfied the first element of First Degree Felony Murder.

We look to the next element. The next question that we have, did a murder take place and was the Defendant reponsible for the killing? I think it is clear again that an unlawful killing took place for the reasons that I stated before the Medical Examiner testified about the details and Cynthia Knighton testified about the details and I don't

think there's any need to go into those details any further. I have submit that we've proven the second element to prove First Degree Felony Murder. We have proven that a robbery occurred, that an unlawful killing occurred.

The third element that we must prove is that the Defendant acted with malice. I remind you that to show malice we have to show that the Defendant either intended to kill the victims or that he knowingly created a very high risk of death with knowledge of the possible consequences. I believe the testimony is clear that Mr. Williams is guilty of First Degree Murder as an aider and abettor. Although he didn't actually pull the trigger, he knowlingly put the victims in a position so that Kareem Martin could pull the trigger. You will recall that he knew, in his statement

that he made, in his confession -- that he knew before he even went over to the home on Mendota that there was going to be a killing. Kareem said that he would have to take them out after the robbery. This is what he knew before he (445) went to the home. You will recall, too, that when the actual robbery was completed, when the actual taking of things was completed, when the actual ransacking of the house was completed, Mr. Williams didn't leave, but he stayed around. Why did he stay around? To complete the plan that he had with Kareem Martin. Why couldn't he leave? Because there were potential witnesses alive, witnesses who could identify Benjamin Williams, who could identify Kareem Martin, who could identify Clarissa Marsh.

Kareem martin, you will recall the testimony, took Mrs. Scott down to

the basement. The Defendant Williams responsibility was to take Cynthia Knighton and Koran Knighton to the basement. It was made clear again when Kareem Martin in the basement says, "We're going to have to hurt them." And what was the Defendant's intent? Did he intend to kill? I submit that -- you remember I told you about the instructions on intent? A person's intent is expressed in two different ways, through a person's words and through a person's conduct. Mr. Williams' intent was clear because at the time that Kareem Martin fired the fatal shots that killed Mrs. Scott, Mr. Williams was some six feet away, somewhere in the center of the basement. And what was he doing? He had his gun out and he was pointing it at Mrs. Knighton and her son Koran. And his

purpose as to make sure that they couldn't escape. Why else would he be standing downstairs in the basement with his gun out pointing it in that direction?

(446) You will recall, too, the testimony of Cynthia Knighton, who told you that after the two shots were fired that killed Mrs. Scott, I asked her a question, "Mrs. Knighton, after the two shots were fired from the area where you(sic) aunt was, why didn't you try to getup(sic) and try to run away?" She told you very clearly, "I couldn't, because that man, Mr. Williams, was standing there holding a gun pointing it at me and my son." But for Mr. Williams' participation in the basement she might have been able to escape the basement. But for Mr. Williams' participation, Kareem Martin might not have been able to

put himself in the position close enough to inflict a deadly wound in Koran Knighton. You recall the testimony, it was a contact wound. But for the Defendant Williams, Kareem Martin might not have been able to get close enough to shoot Cynthia Knighton three times. And it is clear, I submit, that the Defendant is guilty of First Degree Felony Murder of Ollie Scott in Count I, he is guilty of the First Degree Felony Murder of Koran Knighton in Count II and he is also guilty in Count III of Assault With Intent to Murder on Cynthia Knighton. Count III charges him with Assault With Intent to Murder, and the only reason there is a Count III of Assault With Intent to Murder is that through the grace of God Cynthia Martin's(sic) life was spared and she as allowed to stay alive.

PROSECUTOR'S CLOSING ARGUMENT

You may ask yourselves about the confession that the Defendant made where he confessed to the robbery and tried to take himself out of any participation in the shooting. I (447) submit that it's understandable to make a statement, as Mr. Williams did to the police, especially under the circumstances. I doubt that anyone would want to admit that they participated in the shooting of a four-year-old boy. I doubt if anyone wants to admit that they participated in the shooting of a 32-year-old woman. So it's clear when you look at his statement and he tries to take himself out of it that it's not enough for a reaonable doubt. You look at the statement, he says, "I came downstairs and then Kareem came down with the lady. I said, 'let's go, let's go.' Kareem said no. Kareem then took the two

ladies and the little boy down to the basement and that's when I left to go to the car. I went to the car and got in the back seat. A couple of minutes later Kareem came to the car and said that he thinks that the girl was still living because she was still moving and he didn't have any more bullets. He asked me how come I didn't come down to the basement and I said I wasn't doing no shit like that." He might have wanted nothing to do with the killings, if that's what he did, if he would have left the basement at the time the shots were fired, or if he had not been in the basement, as he claimed. But you will recall the testimony of Cynthia Knighton, who remembers that night, and she told you that when Kareem Martin got on his knees and knelt before her and pulled up the blanket, and just before he fired the

shots she looked and she saw Mr. Williams standing directly behind Kareem Martin with a gun, therefore, Ladies and Gentlemen, as to Defendant Benjamin Williams (448) I ask you to return verdicts as charged, Guilty of First Degree Felony Murder, Count I; Guilty of First Degree Felony Murder, Count II; and Guilty of Assault With Intent to Murder in Count III.

Now, the same law that applies to Mr. Williams applied to Clarissa Marsh as well. The People must prove the same elements that I talked about in my discussion about Mr. Williams. her guilt, of course, is to be determined separately from the evidence, but you may consider the same evidence that you heard from the witness stand. The only thing that the Court will instruct you that you cannot consider is that statement that was made by the Defendant Williams. You

cannot consider that statement when you determine her guilt or innocence. To do so would be unfair. The Court instructed you on that.

But I submit to you that you don't need that statement to reach a verdict in this case. The verdicts again are the same. You may find Clarissa Marsh guilty of First Degree Felony Murder in Count I, of Second Degree Murder, of Robbery Armed, of Assault With Intent to Rob Armed or of Attempt Robbery Armed, or you may find her not guilty. In Count II you may find her guilty of First Degree Felony Murder in the killing of Koran Knighton, or guilty of Second Degree Murder, or not guilty. In Count III, you may find her guilty of Assault With Intent to Murder, with the complainant being Cynthia Knighton, or not guilty. The law of aiding and abetting applies with full force to her.

Remember my example about the baseball team, the teamwork necessary for the completion of a successfuly armed robbery; apply it to her. Apply that same law. All persons share equally in the proceeds of the robbery. All person share equally in the responsibility. All people share equally in the guilt.

I submit to you, Ladies and Gentlemen, that it is clear at the bottom line that Clarissa Marsh is guilty of Armed Robbery. You will recall the elements that we have to prove to convict her of First Degree Felony Murder. We first have to establish that an Armed Robbery, a felony, was attempted or was completed and was committed by Clarissa Marsh; that she assisted in the perpetration of that felony, the armed robbery. Secondly, we must show that an unlawful killing occurred. Thirdly, we

must show that she acted with malice, that is that she intended to kill or place the victims at a very high risk with the knowledge that certain consequences of her acts place them in the danger of death.

Some things to remember about Clarissa Marsh are that she knew Ollie Scott; that she knew that Mrs. Scott had money; that she knew that she was working in numbers; and that she came to Ollie Scott's home with Kareem Martin looking to get some money.

I submit that she intended to rob Mrs. Scott and that she did this can be seen from her words and from her conduct.

As i told you, when you look at a person's intent, (450) it is expressed by their words and by their conduct. The People's theory is that the entire

robbery was planned by the two Defendants and Kareem Martin prior to going over to Mrs. Scott's house, and that this plan is evident for several reasons from the evidence. First of all, when Kareem Martin pulled out his gun, Clarissa Marsh's conduct indicated that she intended to rob, because immediately she stood up and walked over to the door and began looking out of the peephole. I submit that this was part of the plan because Kareem Martin didn't have to say a word once he pulled the gun out. As soon as he did it she stood up and walked to the door; and that her purpose was three-fold.

The first purpose was to be a lookout.

The second purpose was to prevent an escape by any of the victims.

The third purpose was to let Benjamin Williams into the house.

Miss Marsh was asked why she went to the door on direct examination by her attorney, and I'm sure you'll recall her answer because she said she didn't know, she just went to the door.

Why did she say that? i submit that because that's the only thing she can say to clear herself of this crime. If she tells you. "The reason I went to the door was because that was my role in this plan," then she admits to the robbery, and (451) she can't do that. So she's got to tell you, "I don't know, I just stood up and went to the door." I think this conduct indicates that it was part of a plan.

The Court is going to instruct you that when you look at a witness's testimony you look at a lot of different factors, and one of the factors that you look at is whether that witness's

testimony is reasonable, when it is considered in light of all the evidence in this case, and whether it is reasonable in terms of your own general experience and your own knowledge. if she went to the door and she never said a word, I submit that if you were under similar circumstances, that you were a friend and you came over to a friend's house and pulled out a gun, that your friend would show some kind of surprise, that your friend would say, "What's going on? What are you doing? Don't do this. This is my friend." I submit that at worst you'd sit silently on the couch, but not get up and walk over to the door and be looking out of the peephole.

Another way to see that the robbery was planned by all three of the Defendants is that when Kareem pulled a gun he said something about Ollie Scott

knowing about so-and-so's brother being killed. I'm sure you remember that testimony. Ollie Scott made no reply or she said she didn't know what Kareem was talking about. And what did Clarissa Marsh do? And this is where I submit that it shows that she had the intent and that she planned -- did she stay silent? Did she act surprised? (452) No. What did she say? Cynthia Knighton says Clarissa Marsh says. "You know Ollie. You know Mrs. Scott. You know so-and-so's brother; you were over there last week." Now, why is that important? By itself it may not be important. But if you recall, when Benjamin Williams first comes into the house what's the first thing that he says? "I'm so-and-so's brother." Isn't it interesting that all three Defendants, all three perpetrators, make that same

comment. And after he announces himself as being so-and-so's brother that Miss Marsh talked about and that Kareem talked about, that that's when the robbery goes down. Mr. Williams says, "Where's the money?" Why would she say something like that. Why would she follow up with what Kareem said about Mrs. Scott knowing so-and-so's brother being killed? Because she was part of the plan. It's important in light of her testimony when she says Kareem drives over to Benjamin Williams' home and picks him up to go over. What's the thing that she says? "Well, I'm sitting in the back seat of the car." "Did you hear any conversation that was going on in the front seat between Kareem and Mr. Williams?" "No, couldn't hear any conversation. The radio was too loud." I asked you whether that is reasonable. Why did she say that? Why did she say she couldn't hear

any conversation? She said, "I know they were having conversation but I couldn't hear it because of the radio." Because if she admits that she heard the conversation and she admits to the plan, she's guilty of at least armed robbery. So she can't tell you that. How else (453) do you know that she planned the robbery and was guilty of First Degree Felony Murder as well as the robbery? Recall that the doorbell rings and Kareem says to Mrs. Scott, "Who's at the door?" Mrs. Scott says she doesn't know. If you recall the posture of Kareem Martin at the time; he's got his gun out and he's angry, and the obvious question, it seems, is if Mrs. Marsh doesn't know what's going on, this is a complete surprise to her, the obvious question for Kareem to ask is, "Clarissa, who's outside? Who's at the door?" But he

doesn't do that. He doesn't have to ask her who's outside, because Clarissa looks out the peephole and she sees that it's Benjamin Williams, and she doesn't say anything like, "It's Benjamin Williams, Kareem. What should I do? You've got your gun out and you're angry and everything; shall I let him in or shall I keep him outside?" Is it reasonable to just open the door and let Benjamin Williams in? I submit it is reasonable when it's part of a plan, part of a plan to rob what was made beforehand. Doesn't it seem likely that Kareem would ask her who is at the door? "Is it a neighbor? is it a friend? Is it the police?" But he never had to ask any questions. She just opened the door and let Benjamin Williams in. Kareem doesn't have to ask, Clarissa Marsh doesn't have to answer because they've already planned on what to do.

Let's look at some other conduct. When she goes to the door what does she do? Does she just stand there staring at the wall, that she claimed in her testimony? I submit that she does more than that. Cynthia Knighton, who was there, had an opportunity to observe her. She was within two to three feet from her as she laid on the floor. Her feet were two to three feet from Clarissa Marsh, and she said that as she turned she could see Clarissa Marsh and she could see what she was doing. She was looking out the peephole. Why? Because she was a lookout.

I submit that again her intent, her knowledge, her guilt is expressed by her conduct. You will also recall that at one point when Kareem Martin took Mrs. Scott into the kitchen that Cynthia Knighton got up and tried to get away.

She breaks for the front door -- she grabs her son and she runs for the front door. Is she successful in getting away? No. Why no? Because Clarissa Marsh was doing her job; she stopped them from escaping. It's not the kind of a situation that Mr. Walker tried to show in his examination of Cynthia Knighton. It's not the kind of a collision where Clarissa Marsh's hands were just out in front of her as though to protect herself. No. Clarissa Marsh actually grabbed Cynthia Knighton by the shoulders and held her tight enough so she couldn't get away, as Cynthia Knighton testified to.

Now, what happens after she grabs her by the shoulders? Cynthia Knighton says, "I turned around and she was still holding me from behind." So again, Clarissa Marsh's conduct shows her

guilty knowledge, her willing participation in the events, and her intent to take part in the robbery.

(455) Mr. Walker cross-examined Cynthia Knighton about whether Clarissa Marsh said anything or called out to anyone when she ran toward the door. And I think you can see it was really unnecessary for Clarissa Marsh to say anything, because Cynthia admitted that when she got up to run to the door she made a lot of noise and that immediately as she got to the front door she saw that Benjamin Williams was already coming back toward her and he had the gun out and he told her to lay back down on the floor. I submit that Clarissa Marsh had no need to call Benjamin Williams because she was in complete control of the situation. She had grabbed Cynthia Knighton. Cynthia Knighton wasn't going anywhere.

Benjamin Williams was coming there with the gun to assist her to make sure that she wasn't going anywhere. So there was no need to talk, no need to say a single word.

Further, when Mr. Martin and Mr. Williams come downstairs they've got a bag in their hand. What do they do with that bag? Who do they give it to? They give it to Clarissa Marsh. Clarissa Marsh says that she took the bag and she set it down. That doesn't jibe with the testimony of Cynthia Knighton. When he asked her what did she do with the bag she said she held it in her hands.

You can express your intent by your words and by your conduct. The thing that stands out the most throughout this trial about the entire robbery and all the circumstances about the robbery is the lack of words throughout the

robbery, the lack (456) of any communication between the parties involved. Didn't that strike you as a bit unusual for an impromptu robbery? Wouldn't you expect in a robbery for the robbers to come in and communicate? "Okay, I'm covering these people. Why don't you take Mrs. Scott upstairs. If you need me just call down and I'll be right here." When Benjamin Williams went upstairs and he left Clarissa Marsh downstairs, do you recall the testimony, did he say anything to her? No, didn't say anything to her. Wouldn't you expect, if the robbery was committed between Benjamin Williams and Kareem Martin and Clarissa Marsh is the surprised person caught in the middle -- wouldn't you expect Benjamin Williams to say, "Hey, if she tries to escape call me, I'll be right here and I've got my gun."

PROSECUTOR'S CLOSING ARGUMENT

I submit again, Ladies and Gentlemen, that the lack of communication between the people committing the robbery shows a well-conceived, planned, professionally executed robbery. All of the parties knew what their job was once they got inside. There was no need to say anything more than necessary.

Furthermore, and probably most importantly, isn't it interesting that when the Defendants went upstairs they had enough confidence in Clarissa Marsh to leave her alone downstairs with Cynthia Knighton? Defendant Williams and Kareem Martin felt secure enough in going upstairs while Clarissa Marsh stayed downstairs that they never had to say a word to her. There were two people, Cynthia Knighton and Koran Knighton, who, if they got (457) out, might alert a neighbor or might call the police and

might botch up the robbery. But they were confident and secure in Clarissa Marsh that she would do her job.

I submit, Ladies and Gentlemen of the Jury, that when you look at all these facts together -- you can attack perhaps one of the things that I've argued about saying that that alone doesn't show that she planned the robbery. The mere fact that she had the bag in her hand, that alone doesn't mean that she had anything to do with the robbery. But I think when you consider all the facts and circumstances, when you look at all of Clarissa Marsh's conduct, you'll be satisfied that she is guilty of the crime of Armed Robbery and that the People have satisfied the first element of First Degree Felony Murder.

If I might digress for a moment, all the testimony about Clarissa Marsh's depression, about her attempted

suicide, I submit that all that was was a smoke-screeen to try to get you -- to get her out of any responsibility for what happened at the address on Mendota. It was an attempt to try to get some sympathy for this mother of two. And you know why. It's easy to convict a criminal for a crime when you look at the person as a criminal. But it's not so easy to convict a person when you look at the person as a mother of two. I submit that from her conduct she showed you that she committed the crime of Armed Robbery.

Important, too, there's no room for sympathy in (458) this case, and that goes both ways. You can't find these Defendants guilty merely because you're sympathetic to Cynthia Knighton or Koran Knighton or Mrs. Scott or the families of those people. But likewise, you can't find Clarissa Marsh or Benjamin Williams

not guilty merely because you're sympathetic to them. You can't find Mrs. Marsh not guilty because she's the mother of two. There's no room for sympathy in your deliberations. Your job is to determine the hard, cold facts and applying the law to those facts and then reach the proper verdict.

Now, let's look at the other elements of First Degree Murder. We have to show that a killing occurred. There again, the same testimony applies to Mrs. Marsh. You heard the testimony by the Medical Examiner as to the cause of death. You heard the testimony of Cynthia Knighton as to the details of the killing. There was no justification, no cause for the killings. It was an unlawful killing. I submit that the people, through that evidence, have satisfied the second element of First

Degree Murder. I submit that the law of aiding and abetting applies to murder as well, to the assault with the intent to murder.

So then the final question becomes whether Clarissa Marsh had the necessary malice, the final element of First Degree Felony Murder. Malice, you will recall again, requires either an intent to kill or a knowingly created high risk of death to the victims, knowingly creating that high risk of death to the victims with the knowledge that it would probably result in death to the (459) victims.

And as to part two, I submit to you that the Court will also tell you that if you find that Clarissa Marsh conciously intended to commit or attempted or assisted another in the commission of an armed robbery, you may

infer that she knowingly would cause death. I submit that when you see that Clarisa Marsh was in the planning stages of the robbery, you will clearly see why then that she had to be aware of the high degree of risk of death that she caused the victims to be placed in.

For these reasons -- most importantly, she had a reason to see that these victims were killed. First of all, she knew Ollie Scott, she knew that Ollie Scott could recognize her. They knew each other for some two years. She knew that Ollie Scott, if she was left alive, could call the police and tell them the name and address of Clarissa Marsh; that she could be a witness, that Cynthia Knighton could be a witness and possibly Koran Knighton could also be a witness. And that when she entered the house she realized that she couldn't just kill

Ollie Scott and leave the other two witnesses. What good would that do? She would still have Cynthia Knighton, who could identify Clarissa Marsh as being there during the killing of Mrs. Scott, so if you have to kill all three, you'll have to do it, to protect yourself. And I submit that she had to know that when she entered the house, that she had to know that when she planned the robbery; that she (460) had to expect that Ollie Scott would be there; that she had to expect that Ollie Scott would have to be killed; that she had to know that if Mrs. Scott was not alone that others too would have to be killed. You see, Clarissa Marsh was the key to this whole case. She was the one who opened the door to get into the house. She was the one that Mrs. Scott recognized from their friendship of two years. What do you

think the chances would have been of Kareem Martin getting in by himself at that time on that date? And not only was she the key to get in, she was also the lock on the front door to make sure that nobody got out. So all the men provided the muscles and the guns, she provided the pass key to go in and out of the house on Mendota.

I submit to you, Ladies and Gentlemen of the Jury, that her testimony was also unreasonable in what she did after the commission of the robbery. You will recall her testimony, she said that when she left the house on Mendota sometime around seven-thirty, she went and got her kids and she drove around thinking. She drove and(sic) around and around and she got tired and she finally called her brother, Clarence Jackson. But when did she do that? She did it

sometime between three and four in the morning, some seven-and-a-half to eight-and-a-half hours after she claimed she left the address on Mendota. You look at the testimony of a witness and you evaluate that witness's testimony. And you look at the reasonableness of her testimony when you consider it in light of all the other evidence in this case, in light (461) of your own general background, your own knowledge. I submit that it's more likely that what really happened is that the Defendants got together and planned to do what's next; that Mrs. Marsh did get her kids -- obviously, she couldn't leave them behind after what happened at the house on Mendota; that she dropped off Benjamin Williams and Kareem and then she went to hide out at the motel in Highland Park; that she planned to meet the other

Defendants there; that she didn't park the car in the lot so as not to give suspicion to the car or to the fact that she was there. I submit that she would have had to have gotten there sometime after eight o'clock in the evening, and that after dropping off Kareem and Benjamin she waited and waited for Kareem to come back; that he would come back in a different car because if there's anyone alive there, if there's anyone that recognized the car, they would be looking for that black Monte Carlo. So they would have to come back with different plates. It comes to around three or four o'clock in the morning, no sign of Kareem, no sign of Benjamin Williams. What to do? I submit that she couldn't get ahold of anybody else. So that's when she called her brother, Clarence Jackson, at sometime around three or four

in the morning and told him she had an argument with Kareem, "I've got the kids with me, I need some money. Can you put me up in this motel?" So Clarence Jackson comes, and does she tell Clarence Jackson about what happened, this horrible experience at Mrs. Scott's home; that Kareem pulled a gun and committed a robbery (462) along with another man; that she was involved in this and that she too might be implicated in this? "Please Clarence, help me. What should I do?" Does she ask that? No. She stays and she gets a room. Why didn't she tell Clarence jackson? Because she was a willing participant in the robbery and in the killings. She gets in the room and she testifies that she waits and she hears news in the morning about the killings, so she discovers that the police already know about it. What else

does she do? Who does she call? Does she call Clarence Jackson, her brother? No. Does she call Reverend Charlie Marsh, a minister? No. Who does she call? She calls Kareem's sister. And I submit that when she calls her she says, "Where is Kareem?" And at that point she finds out that Kareem is not there any longer. And then the only response is "What should I do not(sic)?" And she gets the name of a lawyer and then she turns herself in voluntarily. I submit that that's no big deal in this case. She knows in the evening of the day following the killing that the police are looking for the perpetrators of the crimes. She knows that the police knows these people were armed and could be dangerous, so they might come looking for her with their guns drawn. She knows, too, that maybe it would be safer in the

police station that(sic) it would be out in the streets, especially when the word spreads that she was involved in the killing of a four-year-old boy and a 33-year-old woman. Isn't it interesting that she left her car somewhere not far from the Crown Motel and that she gave the keys (463) to her brother Clarence, along with her kids, at two or three o'clock in the morning. The reason she did that, of course, is that the car is in her name, she can't drive it now, especially if the police are looking for that car. And she knows that if she waits at the motel for Kareem that he'll come in a different car.

So I submit, Ladies and Gentlemen of the Jury, that all of these facts, all of that testimony, points to only one inescapable conclusion; that the Defendant Clarissa Marsh is guilty of

PROSECUTOR'S CLOSING ARGUMENT

Count I, Murder in the First Degree of Mrs. Ollie Scott; that in Count II, she's guilty of Murder in the First Degree of Koran Knighton; in Count III, she's guilty of Assault With Intent to Murder.

I thank you for your attention.

DEFENSE CLOSING ARGUMENT

(482) MR. WALKER: If it please the Court, before I get started I would just like to thank everyone on the Jury for your attention. It's been very difficult for all of you, but you paid good attention and we all appreciate that. Of course something like this is not pleasant. It's a horrible crime. We (483) are not here to try to excuse it or minimize it. We all feel bad. It's one of those things. But we all have a job to do, and when something unfortunate like this happens people find the inner strength and they deal with it, and someone definitely should be punished for this crime. It was horrible.

But let's not get carried away. I know we talked a lot in opening voir dire about presumption of innocence and keeping an open mind and trying to be

objective. And I'll be first to admit that it's real tough in a case like this. We have to recognize that we have -- as my co-counsel says -- that we have these prejudices. We have these gut reactions. We don't like what we hear; it's not pleasant. Personally, I'll(sic) lived with this case along with Clarissa Marsh for some five-and-a-half months. With exception of Officer Harris, I've probably been involved in this longer than anyone else in the room. And I have spent a little time going over it and visiting Clarissa and getting to know her. It's a much different person that I see sitting here today, five-and-a-half months later, than the trembling shell of a woman that I saw come to my place --

MR. KRISCIUNAS: Objection, your Honor, I think we're going beyond the scope of argument about the

testimony, and now Defense Counsel is arguing about what he observed back in October of 1978, and I don't think that that's proper to comment on his knowledge of Clarissa Marsh back in October of 1978. Anything of a personal knowledge I don't believe he should (484) be able to go into.

THE COURT: The objection is sustained.

MR. WALKER: I opologize(sic) to the Court.

Now, these gut reactions that we have, these things that upset us, that they get in the way of our objectivity. It's hard, it's real hard for you to provide Clarissa Marsh of that presumption of innocence; I know that. But it is your duty as Jurors. In taking the oath you paid good attention and I know you are doing that.

What about this business of innocence; what does it mean? It's something that's guaranteed to us by the Constitution of the United States of America, something that's given to use. Mr. Krisciunas has compared it to baseball when he talked about everybody sharing, and so on and so forth, and he alluded to the sport of baseball. It might help us understand the presumption of innocence to go to a baseball game. And generally, when a baseball game starts out, and a civil case, when it starts out, both sides start out zero to zero, even. Well, with the presumption of innocence, in this baseball game, People versus Clarissa Marsh, this game starts out 1-0 in favor of Clarissa Marsh. That's what that presumption of innocence means. The Prosecution then has to not only score a run, but they've

got to score a run and then they've got to score another run to go ahead. This is their burden of proof. This is the way the system is set up, and rightfully so.

(485) The Prosecution has to establish to you, as you know, that Clarissa Marsh is guilty of the things she's charged with beyond a reasonable doubt, and that is each and every thing that she is charged with and each and every element of the crime that she's charged with. You, as Jurors, need to be satisfied to a moral certainty. You have to be real sure, beyond a reasonable doubt, which is the kind of doubt, the kind of proof, that would allow you ton(sic) convict a member of your own family if they were charged with a crime and you were a juror.

Now, there is a concept in our system of law that is known as mens rea. It's a Latin term and it translates roughly as evil intent, a guilty mind. And what that concept means is that anytime you do something, whether it be considered illegal from the standpoint of an observer or not, that you as the actor, you as the person accused, have to have acted with mens rea, a guilty mind, with that intent. If a person acts against their will, if a person acts in ignorance, they don't have that mens rea; it's not up here. Fortunately, we can't open peoples' heads and see what's inside.

The State has told us you can infer certain things from people's conduct, you can infer certain things from people's actions and people's words. And at the beginning of the case the

DEFENSE CLOSING ARGUMENT

Prosecution stood up here and promised you folks, he promised you that he would show you conduct on the part of Clarissa Marsh that would convince you beyond a reasonable doubt that she was guilty (486) of the crimes charged. He also promised you that he would show you that she was equally involved and therefore equally guilty.

Has he done this? I don't think so. He's asking you to infer, to speculate. He should be asking you to find beyond a reasonable doubt that this happened, and that when it happened there was a specific intent to do an act and that she had mens rea, a guilty mind. he then comes back and asks you, because he doesn't have that proof -- he comes back and asks you to infer this and infer that. What about this, what about this? And he goes on and he tells a nice story.

He's got a nice theory, But it's not supported by one thread of evidence. He's asking you to speculate.

What has he shown us? He's shown us to every one's satisfaction, I believe, that Clarissa Marsh was in the house on Mendota that evening. We've never denied that. There's no doubt about that. He also told us that she was by the door, right here, right in the doorway of this home. She told us that when she was on the stand. She was there throughout the entire incident, with the exception of the beginning when she was sitting on the couch.

Now, what about the testimony from the stand that you are bound to consider? What about that? Did he carry the burden? Did he convince you beyond a reasonable doubt from what was said in that chair -- I think what's come from

that chair would leave you with reasonable doubt as to what Clarissa Marsh's (487) involvement in this incident.

Now, when Cynthia Knighton was on the stand, what did she tell us? All she could tell us was that when she was coming downstairs, or at some point, she overheard part of the conversation, something about Clarissa being there to pick something up. Cynthia Knighton also said that during the conversation between Ollie Scott and Clarissa Marsh that Kareem Martin pulled a gun. And you heard Miss Marsh say she was talking and she noticed a strange look come on Ollie Scott's face when she looked up and sure enough Kareem Martin had a gun and he was pointing it across the room at all four of them. Miss Knighton also said on cross-examination that it was clear to

her who was in charge of this house, and that's Kareem Martin. He was giving the orders. He was motioning people around, he was motioning and ordering people around.

Now, Cythia Knighton also told us about her attempted escape out the door. She was lying on the floor along with her son -- if you can remember, I asked her later about the position of this couch and this table, because when you look at this drawing it's not really clear. It looks like there's a lot of space here. She said that that table was no more than a foot or two from the couch and that the couch stood probably this high, knee high. Cynthia Knighton also said that she was laying facing in this direction, her feet towards the door. Then she says that she was watching Clarissa Marsh over here behind (488)

her. Now, she told you that she was lying prone on the floor, she had her glasses off and she was able to look all the way around to Clarissa Marsh.

Now, granted, Cynthia Knighton was scared, there's no doubt about that. She said that when she bolted to the door she grabbed her son's hand and went to the door. Now, it seems a little improbable to me that she could have grabbed his hand because he was over here. In fact, Clarissa Marsh said that Koran was still sitting on the floor. It's a small point, but it goes to show that Cynthia Knighton was scared. You heard the testimony on the stand during this trial. I would suggest to you that we're talking about a distance of two to three feet from the floor here to the wall -- the doorway. Clarissa Marsh is standing right in front of the door. In

fact, the State keeps telling you she's looking out the door; that there's a peephole in the door. So she was standing right smack dab in front of the door. And she can't see Cynthia Knighton. She's not watching her, apparently. Cynthia Knighton jumps up and the next thing you know she's there, she's on top of her. Clarissa reacts. She says she was shocked. She says, "I might have grabbed her, I don't know. I don't remember." I would suggest that it wasn't an aggressive act on the part of -- she lunged for the door and Clarissa was in the way. She didn't holler up to anybody, she didn't try to restrain her. She didn't run back this way. Then Benjamin Williams came out and put her (489) back on the floor.

From what we know, there were two guns in that house. Clarissa Marsh

never had a weapon of any type in her hand. Cynthia also told us that Clarissa didn't say anything to her when she was at the door. Clarissa told us she was surprised, she was shocked.

At some point Miss Knighton was asked -- and I don't know who asked her this question, I don't believe it was me -- I think it was probably the State -- something about an incident in the basement. It was asked if she tried to escape at this point and she said she didn't. "Why not?" "There were guns pointed at me."

The question may have occurred to you at some point in this trial, why didn't Clarissa Marsh escape earlier? The same guns were on her. What about Clarissa Marsh? The State would like you to believe that she's the passkey to this whole case. Then he goes on and tells us

all about his theory. And I didn't stand up and object to his argument because you folks heard the evidence. All those things he's talking about, I didn't hear one word from the stand about that stuff. You know, all this things about the motel and thing about the plans beforehand. The Judge is going to read you the theory of the State's case afterwards, and the second sentence of that theory says that the Defendants Clarissa Marsh and Benjamin Williams planned to rob Ollie Scott with the help of Kareem Martin. Planned; (490) absolutely no evidence to support that whatsoever. He can't get out from under his burden of proof and he can't establish beyond a reasonable doubt, so he wants you folks to help him out and to speculate at the expense of Clarissa Marsh.

Again, we have to know the state of mind. We have to know about it.

He says we can determine it through her conduct. You have to ask yourself the question, what is the conduct of Clarissa Marsh? Is it that of a guilty person? Was she armed? No. That's clear; there will be no dispute about that fact.

Clarissa testified that when she heard about the murders it was on the early morning news when she was at the motel; that it turned her stomach. Is that the mind of a guilty person? And upon hearing that she started making arrangements to turn herself in. She called some people who got hold of an attorney for her. She called the police -- I called the police on her behalf. You heard the officer say he had talked to me about it. He told me that she had been identified as being on the premises. And I said, "Fine, when she gets here I'll bring her in." And we did. We went

in. We went in about 11:30 at night, down to 1300 Beaubien. i would submit to you that those are not the actions of a guilty person. She never fled. She fled that house and she made arrangements to get herself into the Police Department and for someone to take care of her boys. I submit that that's not the conduct of a guilty person.

(491) You saw Clarissa Marsh take the stand. She testified in her own behalf knowing full well that she would be subjecting herself to extensive cross-examination by a very able trial attorney, that being the Prosecutor. I would submit to you that all these actions are inconsistent with guilty.

Now, what are Clarissa Marsh's legal defenses in this case? That's probably been going through your minds. And I'm going to tell you. I'll lay it

out for you. As you know, from the outset of the case, and you'll find out more about it during the instructions from the Court, Robbery, Murder, Assault With Intent to Murder are all specific intent crimes. That means that the Prosecutor must prove beyond reasonable doubt, among other elements, that Clarissa Marsh had the specific intent to commit these acts; that she went over there knowing that she was going to rob, she went over there knowing that she was going to kill.

Like I say, we can't look into her mind and see specific intent or not you don't see specific intent. You have to look at a lot of things. Why did Clarissa Marsh think she was going to Ollie Scott's house? She thought she was going to Ollie Scott's house to borrow money because she had lost her money and

she needed money. In fact, Cynthia Knighton even heard her when she was going down the stairs saying she had come over there to pick something up. She came over there to pick up a loan. Unfortunately, Clarissa Marsh was a dupe. (492) Do you know what a dupe is? She was used by that man and taken advantage of. Kareem Martin used this woman and abused this woman.

Now, what about the money; she testified she borrowed money from Ollie Scott before on several occasions. In fact, on the last occasion before the 29th of October, Ollie Scott had come over to her house to bring her the money. They had worked together, they talked to one another. They were friends. Clarissa needed a loan this particular day. She said the man didn't get his cop money -- or she had lost his cop money

when she lost her wallet. She called around different places that day, her brother for one. "Can you lend me some money?" "No, I'm sorry, I can't." I believe he had a house note or something and he just didn't have the money to lend her. The wallet was mailed back to her home address and Ms. Jackson got the mail and opened it and saw it was a wallet, but not money, no credit cards. Now, one would expect that with the Prosecution's burden of proof that they would disprove this, and they haven't.

What else tells us that she didn't have the specific intent to rob and to kill? Well, she wasn't armed. We never heard one word about Clarissa Marsh saying anything about robbery. You never heard anything about anyone saying anything in her presence about hurting anyone. I specifically asked that

question, if you remember. I asked Cynthia Knighton (493) specifically that question, if you remember, and she said that the first she heard that anyone was going to be hurt when they were down on the second stairway going downstairs into the basement. The two men were there, Clarissa marsh was not there. What about her intent? Did she ransack the house? Not at all. Every single word that came from that stand with regard to her actions was that she didn't do anything. I submit to you that there is not one bit of evidence as to specific intent on the part of Clarissa Marsh to commit a crime.

Now, Clarissa Marsh's second defense is that of duress or coercion; that when she was duped into going to this house with the belief that she was going to borrow money from this man, he produced a gun and a robbery was under

way. We all used to scoff at the idea that people could be forced to do something that they didn't want to do. Remember a couple of years back F. Lee Bailey tried to show that Patricia Hearst had been brainwashed and she did things she didn't want to do. Then about six months ago we hear about this awful news down in South American where all those people committed suicide at the command of some maniac. Suddenly, everyone says, "Yeah, I guess people can be brainwashed."

Now, the Judge will read you instructions on the defense of duress. I would like to read them to you and then we can go over them --

MR. KRISCIUNAS: Objection, your Honor. I don't (sic) he should read any instructions to the Jury; I think that's the Court's responsibility.

DEFENSE CLOSING ARGUMENT

MR. WALKER: I'm certainly able to explain the defense, your Honor, and I know of no authority that says that I cannot.

THE COURT: Mr. Walker, I believe you can tell them what your opinion of the law is and your opinion as to how it applies to this particular instance, to your client, but I don't think you can read the instructions to them. I think you can argue the elements of that instruction.

MR. WALKER: Okay, your Honor, I will comply with that.

In defining duress, the Judge will tell you that the actions of the Defendant that are brought about pursuant to the threatening conduct of another is duress. Now, we have -- it is clear in this case that Kareem Martin pulled a

gun. Now, how then do we say that this was threatening conduct as to Clarissa Marsh? Well, we had a lot of testimony, we talked a lot about her relationship with this man, Kareem Martin, and the Prosecutor would like to have you believe it was all, and I believe his words were, a smoke screen. It wasn't a smoke screen. It's to enable you to somehow pry open Clarissa Marsh's head and see what makes her tick and to set up the circumstances that surrounded her life at that time and that period in her life, and which culminated on the evening of October 29th at this (495) house on Mendota.

The Judge will further instruct you that a defendant is not guilty if she acted under, or committed an offense as a result of such threatening conduct. Now, how do we determine that? How do we

determine why she acts and what motivates her and what scares her? We have to look at the surrounding circumstances. What are the surrounding circumstances in this case? Clarissa Marsh met Kareem Martin about the fall of 1977. She was 33 years old, lives alone with her two boys. She was introduced to this man by his sister. She starts seeing him a little bit. He comes over around Christmas time and gives the kids gifts; but it wasn't any big deal. But as you remember her testimony from the stand, he got to her through her kids. Those gifts, that little bit of kindness, that warmed her up to the man.

Now, we can sit here and say that she should have known better, but we can't say that. The woman was 33 years old, alone, two children. She appreciated those kindnesses. This man

basically took over her life. We have a lot of evidence about the car; just one small part. This was her car. Her mother had signed for her, she was making the payments. After this incident you heard that the car was repossessed because the payments were no longer kept up. Did she have use of the car? She said only when he didn't have to use it. He took the car over. You heard her brother say that there were times when he had to pick her up (496) and drop her off back home. He abused her physically, knocked her around. When she tried to reason with him he would abuse her. She asked him to leave. In June of last year she discovered that he was a drug addict. She again asked him to leave, get out. He refused. This man had a temper. He didn't have to yell at her. Remember her words from the stand? "Nobody in this

room knows what this man was like when he got that look in his eye."

Ms. jackson, the upstairs neighbor, she was only around that place for two weeks, three weeks, maybe, October, before this incident happened, and she noticed it. And she said that when this man would say jump, Clarissa would say, "How high?" All this background is necessary for you to understand the frame of mind this woman was in on October 29th. She tried to commit suicide, not once, but twice; once in the summer and once not too long before this incident. She told you, folks, as to why she tried to commit suicide. She said it was the only way out. She didn't know any other way out. She figured that her boys would be better off with her mother and she had to get out of that situation because that man

was a tyrant. She described him as overbearing. That's a kind word. Now, some of us have had contact with people with drug addictions; they're hard to deal with. They get moody. They are unpredictable.

You heard from Officer Harris that this man, (497) Kareem Martin, was known to the police; he had a police record. You heard that he used Clarissa, he used her family. It was clear to Cynthia Knighton, who never laid eyes on this man before, that he had some power over the other people in that house; that he was in charge. The Prosecutor commented that he didn't make a lot of demands; he didn't have to. As Clarissa said, "No one in this room knows what this man was like when he got that look in his eye."

Now, when you determine whether or not this woman was under duress, and

the Judge will instruct you as to this, you're supposed to consider the surrounding circumstances. You are supposed to consider the nature of the threats, that is how was he threatening her. He had a gun. You have to consider the nature of the man. She was afraid. She had already displeased him once that day; she lost his money. She went to get a loan, but he said he was going with her to make sure she got the loan. Well, he sure did. He used her for the final time.

You are also supposed to consider the background and the character of the person making the threats. Do I have to say anything about someone who would shoot a baby? You are also supposed to consider the situation of the Defendant at the time of the act. Clarissa was in that house; there's no

doubt that she was in that house, although she wished to God she wasn't. And she took her first opportunity to get out of that house. He had that look in his eye. She was trying to appease him, trying to borrow the money that he needed.

Now, we've heard testimony that when they were at the house on Mendota that a gun was produced; Clarissa was sitting on the couch and she got up and went over to the door. Mr. Martin didn't say anything, he didn't have to say anything. He pointed that gun at her -- you heard her say he waved it, looked at her; well, she got out of the way.

What about opening the door for Benjamin Williams? Even though the Prosecutor said it didn't happen, I heard the testimony and you heard it, Martin said to someone, "Who's at the door?" and

I believe it was Ollie Scott who replied, "I don't know." Clarissa looked out and saw the other man. What was her explanation of that? "God, I didn't know what to do, I saw this man." She said he didn't have a gun at that point, or maybe it wasn't evident. "Maybe he's got to go. Maybe he'll tell Kareem he's in a hurry, let's go. It's our chance to get out? She opens the door. There has been testimony that she was a lookout; that she was looking out the door, she was looking out the peephole. She said she was looking out the door to find out where her car was, and looking for anything; "I want to get out of there." You have to remember that all this time there are guns in that house. Clarissa doesn't have one.

What about the so-called grabbing of Cynthia Knighton? Again, two

sides to everything. She's standing in the door, this person wants to go through the door. What's going (499) to happen? There's going to be a collision. Has he shown you that Clarissa came out and grabbed her, yelled at her or yelled at someone else? No. Where was the other man? He was in here. He saw what happened, evidently, and came out. Kareem Martin came downstairs, he handed Clarissa a bag or bags. He still had the gun and that look in his eye.

I submit to you, everything that Clarissa did in that home is reasonable and is open to your own interpretations by the fact that this woman was scared to death, and her first opportunity, what does she do, she beats it out the door and she runs. She doesn't know where she's running. She sees her car, gets in it and takes off.

Now, that's where the Prosecution came up with this wonderful story about her riding around, despite what she says on the stand, despite what her brother says about picking up the car and the boys, he's got an answer for us; no proof, but an answer, none the less. Can he show you once that she acted with malice? Is there any one situation that doesn't have an innocent interpretation? No, he can't show you that she acted with malice. He can't. he doesn't have it. He doesn't have the proof. He's asking you folks to help him out and speculate. Can he show you that she had evil intentions? Can you actually believe that the mother of two boys is going to have malice toward another youngster? Of course, he's got an explanation for that, doesn't he? He says, "Well, you know (500) they're planning a robbery, they're

going to kill people and no one is going to be around. Okay, even given the fact that there's going to be a robbery, does that mean that they're going to call the police and say, "Look, this is your local numbers house, we've just been robbed." Not likely.

I think that the case as it was presented leaves a reasonable doubt. And when you return a verdict, it should be not guilty for Clarissa Marsh.

Thank you.

JURY INSTRUCTIONS

(April 23, 1979)

(3) Good morning, Ladies and Gentlemen of the Jury. The evidence and arguments in this case have been completed. I will now instruct you as to the law. Following the instructions I am about to give you, you will go to the juryroom to deliberate and decide on your verdict. But remember that you are sworn to deliberate and decide this case justly. Sympathy and prejudice must not interfere with your decision or influence your decision. It is my duty as Judge to instruct you on the law you are to apply to this case and it is your duty to follow the law as it is given to you.

From time to time you have already been given some instructions. You must consider all of my instructions as a connected series which together from the law that you are to apply to this case.

JURY INSTRUCTIONS

You should not pick out one or some instructions (4) and disregard others. It is your duty as Jurors to determine the facts. You are the sole and exclusive judges of the facts. You alone determine the weight, the effect and the value of the evidence, as well as the believability of the witnesses. You must consider and weigh the testimony of all witnesses and evidence. You alone are to determine whether to believe any witness or evidence and the extent to which any witness or evidence should be believed. Your decision as to any fact in this case is final.

Now, when we first started I told you that the case came to the Court because an Information was filed by the Prosecutor's Office. An Information is used to inform the Defendants, in this case Clarissa Marsh and Benjamin Williams, of the charges against them.

JURY INSTRUCTIONS

The Information in this case reads that on October 29th, 1978, at 12627 Mendota in the city of Detroit, that Walter Leslie Martin, Clarissa Marsh, and Benjamin Williams, while in the perpetration or attempted perpetration of a robbery, did kill and murder one Ollie Scott, contrary to Section 750.316, Michigan Compiled Laws Annotated. That's Count I.

Count II: While in the perpetration or attempted perpetration of a robbery, did kill and murder one Koran Knighton, contrary to Section 750.316, Michigan compiled Laws Annotated.

And Count III, did assault Cynthia Knighton with intent to murder with a certain weapon, to-wit a handgun, contrary (5) to Section 750.83, Michigan Compiled Laws Annotated, and against the peace and dignity of the People of the State of Michigan.

JURY INSTRUCTIONS

Now, at the time that I read that to you I also told you that the Defendants in this case were presumed innocent and that the burden was on the Prosecutor to prove them guilty beyond a reasonable doubt.

Now, basic to our system of criminal justice is that principle that a person accused of a crime is presumed to be innocent. This presumption of innocence started at the very beginning of this case and continues throughout the trial and during the deliberations. Each and every one of you must be satisfied beyond a reasonable doubt, after deliberating, that the Defendants are guilty before you can return a verdict of guilty. You must begin your deliberations with the presumption of innocence foremost in your minds.

The fact that the Defendants were arrested and are on trial is no evidence

against them. There must be evidence introduced in the trial that convinces you of the Defendants' guilt beyond a reasonable doubt. The law does not require a Defendant to prove his or her innocence or to produce any evidence whatsoever. The burden of proving guilt is upon the prosecution throughout the entire course of the trial and at no time does the burden of proof shift to the Defendants. This burden of proof means that every element of the crime charged must be proven by evidence beyond a reasonable doubt.

(6) A reasonable doubt is a fair, honest doubt growing out of the evidence or lack of evidence in this case, or growing out of any reasonable or legitimate inferences drawn from the evidence or the lack of evidence. It is not merely an imaginery (sic) doubt or a flimsy, fanciful doubt, or a doubt based upon the

mere possibility of the innocence of the Defendants, or a doubt based upon sympathy, but rather it is a fair, honest doubt based upon reason and common sense. It is a state of mind which would cause you to hesitate in making an important decision in your own personal life.

By stating that the Prosecution must prove guilt beyond a reasonable doubt, I mean there must be such evidence that causes you to have a firm conviction to a moral certainty of the truth of the charges here made against these Defendants. When you deliberate, you are only allowed to consider the evidence which has been properly admitted in this case. That means the testimony from the witness stand and the exhibits. Many things are not evidence and should not be considered as evidence. Evidence includes only the sworn testimony of witnesses, the exhibits and other facts

and testimony which the Court tells you to consider as evidence.

From time to time during the trial the Court has had to rule on motions or objections by Counsel. I must do so according to the law, and the rulings do not reflect any personal opinion about the facts in this case. Such rulings are not (7) evidence and you must not give any weight either to the rulings or to the number of rulings. Neither my comments nor my instructions are evidence and they should not be taken as any indication of the Court's opinion as to how you should decide this case.

If you have come to the belief during the course of the trial that the Court is telling you how to decide this case, you must disregard that opinion. You are the sole judges of the facts and you alone have the solemn duty and obligation to decide this case from the evidence. Any

statements or arguments of the attorneys are not evidence, but are only intended to assist you in understanding the evidence and the theory of each party. The questions which attorneys ask witnesses are not themselves evidence. It is the answers of witnesses which provide evidence. You should disregard anything said by an attorney which is not supported by the evidence or by your own general knowledge and experience. You should use your own general knowledge and experience in judging whether any particular evidence seems reasonable and probable. However, if you have personal knowledge of a particular place or event, you may not consider it, since this case must be decided only from the evidence which is shown during the trial.

In determining whether any fact has been proved, you should consider all of the evidence without regard to which

party produced the evidence.

Now, the evidence in this case is of two different (8) types. On the one hand, there is direct evidence, such as a statement by a witness about something he saw or heard himself, or an exhibit. If believed, direct evidence establishes that fact.

The other type of evidence is circumstantial evidence which does not prove a fact but which points to the existence of that fact. In this regard, if a witness were to tell you that he saw human footprints in freshly fallen snow, this, if believed, would point to the recent presence of a human being at that place. It is not necessary that every fact be proven directly by a witness or an exhibit. A fact may be proven indirectly by other facts and circumstances from which it usually and reasonably follows, according to common

experience. Such evidence is proof which can be used to prove that a certain fact existed.

Circumstantial evidence must be considered by the following rules: (a) The circumstances themselves must be believed: (b) The circumstances must be consistent with guilt and inconsistent with innocence; (c) The circumstances must be of such a conclusive nature and tenetcy (sic) that they convince you beyond a reasonable doubt of the Defendant's guilt. If the evidence is open to two reasonable constructions, one indicating guilt and the other innocence, it is your duty to accept the construction indicating innocence.

Now, you are the sole judges of the facts in this (9) case and must determine which witnesses you will believe and what weight you will give to their testimony. In doing so you may take into account the

witness's ability and opportunity to observe, the witness's memory, the witness's manner while testifying, age, any interest, bias or prejudice the witness may have, and the reasonableness of the witness's testimony considered in the light of all the evidence in the case.

If you will recall, at the start of this trial there was a stipulation that the attorneys agreed upon relative to the identity of Koran Knighton and Ollie Scott. As I told you at that time, a stipulation of fact is an agreed statement of facts between the attorneys. You may regard such stipulated facts as true.

The fact that a witness is a police officer does not give his testimony any greater or lesser weight than the testimony of any other witness. You as Jurors have the duty of weighing the

believability of the testimony of all witnesses and giving a witness's testimony such weight as you believe it deserves under all of the circumstances you have observed, and this includes the testimony of police witnesses. Such testimony is to be judged by the same standards as any other testimony.

Now, the Prosecution has introduced evidence of a statement which he claims was made by the Defendant Benjamin Williams. Before you may consider any such out-of-court statement as evidence against the Defendant Williams, you must determine (10) two things: First you must find that Defendant Williams in fact made the statement as it was given to you. Obviously, words said to be written or spoken by a defendant should not be used against him unless he actually spoke or wrote those words. Only so much of the statement as was actually made by a

defendant may be considered as evidence against him.

Second, if you determine that the statement was made by the defendant, then you must consider whether the statement or any part of it is true. You should consider the facts and circumstances surrounding the making of the statement along with all the other evidence in the case and judging its truthfulness and deciding how much weight, if any, the statement deserves. Should you accept the statement or any part thereof as true, you may then give it whatever weight you believe it deserves.

The statement of Co-Defendant Benjamin Williams has been admitted into evidence against him only. I caution you that it may be used only in considering the guilt or innocence of Defendant Benjamin Williams, under the rules already given to you, and must not be used or

considered in any way against Defendant Clarissa Marsh. To do so would be most unfair and in violation of the oath that you took as Jurors.

Now, every defendant in a criminal case has the absolute right not to testify. The defendant has no obligation to testify or to prove his innocence in any manner. You are not permitted to consider his silence in your deliberations, and his (11) silence must not influence your verdict in any manner whatsoever.

Defendant Clarissa Marsh took the stand to testify, and she had a right to take the stand and become a witness in her own behalf. It is your duty to consider her testimony by the same standards as you would that of any other witness who has appeared on the stand.

The Defendants in this case, in Count I and II of the Information as it has

been read to you, with the crime of Murder in the First Degree. The law, as it applies to this case, states that all murder which shall be committed during and as a result of the committing or attempting to commit robbery, shall be Murder of the First Degree. The defendants plead not guilty.

There are two kinds of murder, First Degree and Second Degree. You will be instructed as to both. Murder of either degree is the killing of one person by another with malice.

Malice is a term with special meaning in the law. Malice means that the defendant intended to kill or that he knowingly created a high risk of death with knowledge that it probably would result in death, and that he did so under circumstances which would not justify, excuse or lessen the crime. First Degree and Second Degree Murder are the same

crime, except that First Degree Murder has one more element. The additional element is that the death must have occurred as a direct result of the commission of the crime of robbery.

You will first be instructed on Murder of the (12) Second Degree. Keep in mind that all of the elements of Second Degree Murder are necessary to prove First Degree Murder. To establish Second Degree Murder the Prosecution must prove each of the following elements beyond a reasonable doubt:

First, that the deceased, Koran Knighton and Ollie Scott, died on or about October 29th of 1978, within the city of Detroit.

Second, that their deaths were caused by an act of the Defendants or because the Defendants consciously created a very high degree of risk of death to another with the knowledge that it probably would

cause death.

Third, if you find that the deaths wee caused by the Defendants you must determine whether the Defendants are guilty of any crime. The killing of one human being by another may be entirely innocent. It is not the act of killing in itself which makes it a crime, but the state of mind with which it is done.

Fourth, for Murder you must find that the Defendants consciously and knowingly performed the act which caused death. The Defendant must have either intended to kill, that is he must have done the act intending that it result in death or in great and serious bodily injury, or he must have knowingly created a very high risk of death with the knowledge that it probably would cause death. The degree of risk for murder must be so reckless and wrongful as to amount to a criminal purpose and against a (13) person's life,

and the Defendants must have been conscious of that risk.

For Murder in the First Degree, the Prosecutor must prove beyond a reasonable doubt the four elements of Second Degree Murder, which have been described to you. In addition, he must prove beyond a reasonable doubt the fifth element which raises the crime to First Degree Murder. Fifth, that at the time of the act which caused the deaths of Ollie Scott and Koran Knighton, the Defendants were committing or attempting to commit, or assisting another in the commission of the crime of robbery.

For the crime of Robbery, the Prosecution must prove each of the following elemen s beyond a reasonable doubt: First, that the Defendants assaulted Ollie Scott. An assault is an attempt or a threat with force and violence to do immediate bodily harm to

another by one who has the apparent present means of doing such harm.

Second, that at the time of such assault, the Defendant was armed with a dangerous weapon or with an article used or fashioned in a manner to lead the person so assaulted to reasonably believe it to be a dangerous weapon.

Third, that at the time of such assault the Defendants took the money or propert (sic) alleged to have been taken, money or property which did not belong to the Defendants.

Fourth, that this money was taken from the person or in the presence of Ollie Scott. The from his peron (sic) or in (14) his presence element is established by proof that violence or putting fear of violence was the means used to take away possession or control over the property.

Fifth, the property taken must have been of some value, but the extent of the

value makes no difference. The amount of money taken makes no difference.

Sixth, there must have been some movement of the property in order to make the crime complete. However, any movement of the property by anyone is enough. The property may have been moved by a confederate or a partner, by an innocent bystander or by the victim, if acting under the direction or order of the robber.

Seventh, at the time of the taking the Defendants must have intended to deprive Ollie Scott of the property taken.

With Robbery there are also the lesser included offenses of Attempt, and Assault With Intent to Rob Being Armed.

To establish an attempt, the Prosecutor must prove first that the Defendant intended to commit the crime of robbery, as has been described to you. Second, that the Defendants performed an

act toward committing a crime. Not every act is sufficient to constitute an attempt. In determining whether or not the Defendants performed an act sufficient to constitute an attempt, it is necessary to distinguish between mere preparation, on the one hand, and the actual start of the doing of the criminal deed on the other. Mere preparation, which may consist of (15) planning the offense or of doing some act which may (be) innocent in itself is not enough. However, if the act or acts of the Defendant can lead only to one end, that is that they cannot within reason be regarded as pointing to any other purpose than the commission of the crime charged here, then they constitute an attempt. Such end must be clearly indicated beyond a reasonable doubt.

As to the lesser included offense of Assault With Intent to Commit Robbery

JURY INSTRUCTIONS

Being Armed, first the Prosecution must prove beyond a reasonable doubt that the Defendant assaulted Ollie Scott. An assault is an attempt or threat with force and violence to do immediate bodily harm to another by one is (sic) has the apparent present means of doing such harm. Second, that at the time of such assault the Defendant was armed with a dangerous weapon or an article used or fashioned in a manner to give reason to believe that it is a dangerous weapon. Third, that at the time of such assault the Defendants intended to rob and steal. Robbery occurs when a person assaults another and takes money or property from his or her person or in his or her presence intending at the time to deprive that person of the property. It is not necessary in a charge of Assault With Intent to Rob that the crime of robbery be completed or that the Defendant had

actually taken any money or property. However, there must be proof beyond a reasonable doubt that at the time of the assault the Defendant intended to commit the crime of robbery.

(16) Also, with regard to aiding and abetting, for First Degree Murder, the Defendant must have been either committing or assisting another in the commission of the crime of robbery, that has just been defined to you.

Now, it is charged in this case that Benjamin Williams and Clarissa Marsh either directly committed the crime charged, which is robbery, or that they intentionally aided or assisted another in the commission of that crime. All persons who aid or assist in the commission of a crime are as liable as if they directly committed the crime and can be convicted of the principle offense as an aider and abettor.

JURY INSTRUCTIONS

The Defendants Benjamin Williams and Clarissa Marsh are charged with First Degree Murder in the course of committing a robbery. Before you may convict you must be convinced beyond a reasonable doubt, first that the Defendants intended to commit the crime of robbery at the time of giving the aid or encouragement.

Second, that the Defendants performed acts or gave encouragement which aided or assisted the commission of the crime of robbery either before or at the time of the commission of the crime.

Third, that the crime of First Degree Murder occurred as a result of this robbery.

Fourth, that this crime which occurred was fairly within the criminal plan and the Defendants might have expected (17) this to happen in the course of committing this robbery.

For Murder in the First Degree there

must be proof beyond a reasonable doubt that the killing occurred as a result of the crime of robbery and that the Defendants were at the time engaged in committing or attempting to commit or aiding another in the commission of that crime.

Now, as I indicated to you in the instruction, malice is one of the elements of murder. If you find that the Defendants consciously committed or attempted to commit or assisted another in the commission of a robbery knowing that a very high risk of death or knowledge that that would probably cause death.

In Count III of the Information the Defendants are charged with Assault With Intent to Commit Murder. Any person who shall assault another with intent to commit the crime of murder is guilty of this crime. The Defendant pleads not

guilty to this charge.

To establish this charge the Prosecution must prove each of the following elements beyond a reasonable doubt.

First, that the Defendants assaulted Cynthia Knighton. An assault is an attempt or threat with force and violence to do immediate bodily harm to another by one who has the present means of doing such harm.

Second, that at the time of committing such assault, (18) the Defendants intended to murder the Complainant. Murder is the killing of one person by another with malice.

As I indicated to you, Malice is a term with special meaning in the law. Malice means that the Deferdants intended to kill or consciously created a very high degree of risk of death with knowledge of the probable consequences of

the act, and that this was done so under circumstances which did not justify, excuse or mitigate the crime.

When a certain intent is a necessary element in a crime, the crime cannot have been committed when the intent did not exist. Intent is a decision of the mind to knowingly do an act with a conscious objective of accomplishing a certain specific result. There can be no crime of robbery under our law where there is no intent to deprive a person of his property. There can be no crime of felony murder in the first degree where there is no intent to rob. There can be no assault with intent to rob where there is no intent to rob. There can be no crime of attempt robbery armed where there is no intent to rob. And there can be no crime of assault with intent to murder where there is no intent to kill; and the burden rests upon the Prosecution

to show beyond a reasonable doubt that the Defendants, at the time of doing the alleged acts, had the wrongful intent with regard to each of those specific crimes.

The intent with which a person does an act is known by the way in which he expresses it to others or indicates (19) it by his conduct. The intent with which a person does an act can sometimes be determined from the manner in which it is done, the method used, and all other facts and circumstances, but only if that intent is established by the evidence.

Now, in this case Clarissa Marsh, it is claimed that her actions were caused by the threatening conduct of another. This defense is called duress. Clarissa Marsh is not guilty if she committed this offense as a result of such threatening conduct and under the following conditions.

JURY INSTRUCTIONS

First, the threatening conduct must have been sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm.

Second, the conduct must have in fact caused such fear of death or serious bodily harm in the mind of the Defendant.

Third, the fear or duress must have been operating on the mind of the Defendant at the time of the alleged act.

Fourth, the Defendant must have committed the act to avoid the threatened harm.

Fifth, the situation must have arisen without the fault or negligence of the Defendant.

In determining whether the fear or duress was operating upon the Defendant at the time of the alleged act, you should carefully consider all the surrounding circumstances as disclosed by the evidence. Consider the nature of the

threats, or force, if you should find such threats or force to have been (20) made. Consider the background and character of the person making the threats or using the force. Consider the situation of the Defendant at the time she committed the alleged act. Consider whether she had the opportunity or ability to avoid the feared harm without committing the alleged act. In this regard you should also consider the reasonableness of any other course of action in view of all the circumstances which were known to the Defendant at the time.

Now, there was some evidence of duress introduced in this trial. It then becomes the duty of the Prosecution to prove beyond a reasonable doubt that the Defendant was not acting under duress at the time the offense was committed. If the evidence or lack of evidence or the

unsatisfactory nature of the evidence raises a reasonable doubt as to whether the Defendant was acting under duress, then you must find the Defendant not guilty.

If you find that the Defendant, for any reason whatsoever, did not consciously or knowingly act with the intent to rob, the crime cannot have been committed and you must find the Defendants not guilty of the crime of First Degree Murder.

If, from all of the evidence, you have a reasonable doubt as to whether or not the Defendants knowingly and consciously acted with the intent to rob, then you must find the Defendants not guilty of the crime of First Degree Murder.

With regard to Count III, if you find that the Defendants for any reason whatsoever did not consciously or (21) knowingly act with the intent to kill,

the crime cannot have been committed and you must find the Defendants not guilty of the crime of Assault With Intent to Commit Murder.

If, from the evidence, you have a reasonable doubt as to whether or not the Defendants knowingly and intentionally acted with intent to kill, then you must find the Defendants not guilty of the crime of Assault With Intent to Commit Murder.

Now, a gun is a dangerous weapon. You may infer an intention to kill from the use of a dangerous weapon when it is used in such a manner that the death of a person is plainly likely. You may infer that the person intends the usual results which follow the use of a dangerous weapon. You must consider all of the facts and circumstances in determining the state of mind of the Defendants at the time of the act. This may be

inferred from the kind of weapon used, the nature of the wounds inflicted, the circumstances surrounding the killing and the assault, the acts, conduct and language of the accused, with any other circumstances in evidence, in determining whether a person who has killed another is guilty of murder, the nature and extent of the injury or wrong which was actually intended, must usually be of controlling importance. There cannot be a conviction of murder unless the injury intended was one of very serious character which might naturally and commonly involve loss of life or grievous mischief.

If all of the evidence does not convince you beyond (22) a reasonable doubt that the Defendants either intended to kill or consciously created a very high degree of death with knowledge of the probable consequences, then you must

find the Defendants not guilty of the crime of murder.

If you find the Defendants guilty of murder, then it is your duty to state in your verdict whether the Defendants are guilty of Murder in the First Degree or guilty of the lesser offense of Murder of the Second Degree.

The evidence in this case must also convince you beyond a reasonable doubt that the crime occurred on or about October 29th, 1978, within the city of Detroit.

Now, Clarissa Marsh and Benjamin Williams are both on trial in this case. The fact that they're on trial together is no evidence of their association together or of their guilt. Each Defendant is entitled to a separate and individual consideration of his or her case. In considering the evidence, you are to carefully examine it as to each

JURY INSTRUCTIONS

Defendant, as if he or she were on trial alone. You are to consider each instruction given as applying separately and individually to each Defendant unless I tell you otherwise.

When you deliberate you must analyze the evidence as it applies to each individual Defendant. Each Defendant is entitled to have his or her case determined from evidence as to his or her own acts and statements and conduct and any other evidence which may apply to him or her.

(23) The Prosecutor must prove each and every element of the crime beyond a reasonable doubt as to each Defendant.

It is the People's theory of this case that on October 29th, 1978, the Defendants Clarissa Marsh and Benjamin Williams planned to rob Mrs. Ollie Scott, with the help of Kareem Martin; that the three drove to 12627 Mendota in the city

of Detroit at approximately 7:00 p.m.; that the Defendant Marsh and Kareem Martin entered the home first and that when Kareem Martin pulled a gun, Clarissa Marsh took a position by the door as a lookout; that Defendant Williams was allowed in to the house by Defendant Marsh, and he and Kareem Martin proceeded to rob Mrs. Scott; that after they had obtained all they could from Mrs. Scott, Kareem Martin and Defendant Williams took Mrs. Scott and Cynthia Knighton and Koran Knighton down in to the basement; that Kareem Martin then executed Mrs. Scott, Koran Knighton and Cynthia Knighton, however Mrs. Knighton lived; that the shootings were within the scope of the robbery and were planned by the Defendants to eliminate any witnesses to the robbery. Wherefore, Defendant Clarissa Marsh and Defendant Benjamin Williams are each guilty in Count I of

Murder in the First Degree, and Count II of Murder in the First Degree, and in Count III of Assault With Intent to Murder.

Defendant Clarissa Marsh has also a theory of her case; that is on Sunday, October 29th of 1978, Clarissa Marsh proceeded to 12627 Mendota in the city of Detroit in the company (24) of two men. Miss Marsh believed she was going to borrow money from Ollie Scott, a former co-worker of Miss Marsh, who has loaned money to Miss Marsh before. Kareem Martin insist that he accompany her to make sure that she did attempt to borrow the money from Mrs. Scott. Once they arrived at the Mendota address, Mr. Martin produced a gun and announced a holdup. Miss Marsh did not have a weapon and had no prior knowledge that Martin was armed or that a robbery was planned. Miss Marsh, feeling coerced and with no

immediate avenue of escape, just stood by the front door while others ransacked the house. When the victims were ordered in to the basement of the house, Miss Marsh stood at the front door, made her escape, and taking nothing with her which belonged to the Mendota address. Hearing of the murders at the Scott residence via the next day's news, Miss Marsh made arrangements with a lawyer to turn herself in to the police. She did in fact voluntarily present herself at Detroit Police Headquarters on Monday evening, October 30th of 1978, and was placed under arrest.

Now, the Defendants are charged with three counts; that is, with the crime in Count I of First Degree Murder, in Count II, First Degree Murder, and in Count III, with Assault With Intent to Murder. These are separate crimes and the Prosecutor is charging that each

Defendant committed all of them. The fact that the Defendants are being charged with more than one crime is no evidence against them. Each charge must be con- (25) sidered separately in light of all the evidence in the case. You must return an individual verdict for each Defendant.

You may return a verdict of guilty of one or more of the crimes charged, or not guilty, according to the individual determination which you make for each person on trial.

As to Count I, you may also consider whether or not the Defendants are guilty or not guilty of Robbery Armed, Assault With Intent to Rob Being Armed, or Attempt Robbery Armed.

MR. KRISCIUNAS: Your Honor, may we approach the Bench?

THE COURT: Yes, you may.

(Side bar discussion.)

JURY INSTRUCTIONS

THE COURT: Also, Ladies and Gentlemen of the Jury, with regard to aiding and abetting, it does not matter how much aid, advice or encouragement was given, however, you must find that the Defendants intended the commission of the crime and that the aid, advice or encouragement the Defendants gave did in fact aid, advise or encourage in the commission of a crime. Mere presence, even with knowledge that an offense is planned or being committed, is insufficient to establish that the Defendants aided or assisted in the commission of the crime.

Now, in this case as to Count I there are six possible verdicts. As to Count II, there are three possible verdicts. And as to Court III, there are two possible verdicts.

As I indicated to you, each Defendant's case must (26) be considered

separately. The possible verdicts in Count I are not guilty; Guilty, Murder in the First Degree; Guilty, Murder in the Second Degree; Guilty of Robbery Armed; Guilty of Assault With Intent to Rob Being Armed; or Guilty of Attempt Robbery Armed.

As to Count II, you may return only one verdict on that count -- there are three possible verdicts -- Not Guilty; Guilty of Murder in the First Degree, Felony Murder; or Guilty of Murder in the Second Degree.

As to Count III, there can only be one verdict; there are two possible verdicts: Not Guilty, or Guilty of Assault With Intent to Commit Murder.

When you go into the juryroom you will be given verdict forms. After you have deliberated and decided upon a verdict you can mark on the jury form what your verdict is, but keep it with you until

such time as you come back into the courtroom as a group.

The possible verdicts are set forth in the verdict forms which I told you you will receive. Only one of the possible verdicts may be returned by you as to any one particular count. You may return different verdicts for each Defendant, but each Defendant is entitled to your individual determination as to his or her guilt or innocence as to any count. If you all have agreed upon one verdict for each Defendant as to each count, your foreman should mark that verdict. The other verdicts are to be left (27) unmarked. But when you go to the juryroom your deliberations should be conducted in a businesslike manner. You should first select a foreperson and she or he should see to it that the discussion goes forward in a sensible and orderly fashion and that each Juror has

the opportunity to discuss the issues fully and fairly. A verdict in a criminal case must be unanimous.

In order to return a verdict it is necessary that each of you agree upon that verdict. In the juryroom you will discuss the case among yourselves, but ultimately each of you will have to make up your own mind. Any verdict must represent the individual considered judgment of each Juror.

It is your duty to consult with your fellow Jurors and to deliberate with a view toward reaching an agreement, if you can do so without violating your own judgment. Before deciding the case give impartial consideration to the views of your fellow Jurors. This means that you should give respectful consideration to one another's views and talk over differences of opinion in the spirit of fairness and frankness. It is natural

that differences of opinion will arise. When they do, each of you should not only express your opinion, but also the facts and reasons upon which you base it. By reasoning the matter out it is often possible for all the Jurors to agree.

In the course of your deliberations do not hesitate to re-examine your own views and change your opinion if you are convinced that it is wrong. However, none of you should surrender (28) your honest conviction as to weight and affect of the evidence or lack of evidence solely because of the opinion of your fellow Jurors or for the mere purpose of returning a verdict.

Do not concern yourselves in your deliberations with what the penalty might be if you should find the Defendants guilty. The question of guilt and the question of penalty are decided separately. It is the duty of the Judge

to fix the penalty whenver (sic) a defendant is found guilty. Possible penalty should not influence your decision.

If you wish to communicate with the Court while you are deliberating, please have your foreperson write a note and deliver it to the Bailiff. It is not proper to talk directly with the Judge, attorneys, court officers or other persons involved in the case, even if the discussion does not have to do with the case.

During your deliberations you must not disclose the state of your deliberations to others outside the juryroom. Therefore, unless you reach a verdict do not disclose this information even in the courtroom.

If you wish to examine more closely the exhibits which have been admitted into evidence while you are deliberating,

please have your foreperson write a note and deliver it to the Bailiff. The exhibits will then be given to you and you may examine them in the juryroom.

Now, if you wish to communicate with the Court and (29) hand the Bailiff a note, you knock on the door, the Bailiff will answer and take the note from you; is that clear?

Gentlemen, may I see you please.

(Side bar discussion.)

THE COURT: Ladies and Gentlemen, at this time I'll ask you to step into the juryroom, but do not begin your deliberations until you are told to do so.

(Whereupon, at 10:08 o'clock a.m., Jury excused from courtroom.)

THE COURT: Any additions to the charge?

MR. KRISCIUNAS: The People are satisfied with the charge, Your Honor.

JURY INSTRUCTIONS

MR. HILL: Defendant Williams is satisfied with the charge.

MR. WALKER: Clarissa Marsh is satisfied with the charge as given, your Honor.

THE COURT: Is it okay for them to begin deliberating?

MR. HILL: It's okay as to Defendant Williams.

MR. KRISCIUNAS: Yes, your Honor.

MR. WALKER: Yes, your Honor.

THE COURT: I'm also going to give them the verdict forms at this time.

Have the Jurors come back out, please.

(Whereupon, at 10:12 o'clock a.m., Jury returned to courtroom.)

(30) THE COURT: Do Counsel stipulate all the members of the Jury are in their respective places?

MR. KRISCIUNAS: Yes, your Honor.

MR. HILL: Defendant Williams so stipulates.

JURY INSTRUCTIONS

MR. WALKER: Clarissa Marsh so stipulates, your Honor.

THE COURT: Ladies and Gentlemen of the Jury, the verdict forms you have been given are given to you to assist you in your deliberations. You are not bound to use them, and if you wish to write your verdict on a separate piece of paper and hand it to the Bailiff, you are perfectly free to do so. I wanted that to be made clear to you. If you wish to use these, you may; is that clear?

At this time will you please go back into the juryroom but do not begin your deliberations until you are told to do so.

(Whereupon, Jury excused from courtroom at 10:13 o'clock a.m.)

THE COURT: Gentlemen, anything further?

MR. HILL: Nothing further on behalf of Defendant Williams, your Honor.

JURY INSTRUCTIONS

THE COURT: Are you satisfied, Mr. Hill, with the charge and the instructions?

MR. HILL: I am, yes.

THE COURT: Mr. Walker?

(31) MR. WALKER: Yes, your Honor.

THE COURT: Mr. Krisciunas?

MR. KRISCIUNAS: The People are satisfied.

THE COURT: May the Jury begin their deliberations?

MR. HILL: Yes, your Honor.

MR. KRISCIUNAS: Yes, your Honor.

MR. WALKER: Yes, your Honor.

(Whereupon, Officer Caldwell sworn by Court Clerk.)

THE COURT: Thank you.

(Whereupon, at 10:15 o'clock a.m., Jury began deliberations.)

MR. KRISCIUNAS: Your Honor, in the event that the attorneys are not here and the Jurors should request any of the

exhibits, I have no objection to the Bailiff handing all the exhibits over to the Jurors without my being present.

MR. HILL: I would join in that, too, and would have no objection in my absence if the Jury requested certain exhibits that were allowed in evidence, or other things allowed in evidence.

THE COURT: Thank you, Mr. Hill.

MR. WALKER: I would concur in that, your Honor, but I will make myself available throughout the day.

THE COURT: Okay. If you'll let by Clerk know where you'll be, gentlemen.

* * *

(32)(Jury excused for luncheon recess at 12:47 o'clock p.m., and resumed deliberations at 2:00 o'clock p.m.)

THE COURT: The record should reflect that the Court has received a note from the Jury which reads, "We need more

clarification on Murder First Degree, Murder Second Degree and Robbery Armed. Can the Judge explain this again."

In discussing the matter with Counsel, the conclusion of all Counsel is that the instruction on Murder First Degree, Murder Second Degree should be read to them again, if that is in fact what they want, and that Robbery Armed and Attempt Robbery Armed should also be explained, as those would be the felonies that they would be concerned with in the First Degree Murder charge.

Is that correct, Gentlemen?

MR. HILL: Or that they must find that a robbery or attempt robbery was committed before they can even get to the question of whether there was a first degree or second degree murder?

THE COURT: Right. I think the instructions are pretty clear on that.

MR. HILL: I think they are, too, but

they didn't understand them, and that's something else.

THE COURT: But what I don't want to do is go over (33) the entire charge again. Are you ready for the Jury? We can have them come out and ask them specifically what they want.

(Whereupon, at 3:02 o'clock p.m., Jury returned to courtroom.)

THE COURT: Do Counsel stipulate the members of the Jury are present and in their respective places?

MR. KRISCIUNAS: The People so stipulate, your Honor.

MR. HILL: Defendant Williams so stipulates.

MR. WALKER: Defendant Clarissa Marsh so stipulates.

THE COURT: Ladies and Gentlemen of the Jury, I have a note from you which indicates you need more clarification of Murder First Degree, Murder Second Degree

and Robbery Armed; is that correct: Who will speak for you?

FOREMAN SHOEFELD: We would like to hear the explanation of the counts that have been given for us to deliberate on for each of the Defendants.

THE COURT: That is you want to know what the law is relative to Murder in the First Degree, Murder in the Second Degree and Robbery?

FOREMAN SHOEFELD: Yes.

THE COURT: I'll read those instructions to you again.

Counsel, would you approach the Bench for just a (34) second, please.

(Side bar discussion.)

THE COURT: The law, as it applies to this case, states that all murder which shall be committed during and as a result of the committing or attempting to commit robbery, shall be murder in the first degree.

JURY INSTRUCTIONS

The Defendants plead not guilty.

There are two counts of murder, First Degree and Second Degree. You will be instructed as to both. Murder of either degree is the killing of one person by another with malice.

Malice is a term with special meaning in the law. Malice means that the defendant intended to kill or that he knowingly created a very high risk of death with knowledge that it probably would result in death, and that he did so under circumstances which would not justify, excuse or lessen the crime.

First Degree and Second Degree Murder are the same crime, except that First Degree Murder has one more element. The additional element is that the death must have occurred as the direct result of the commission of the crime of robbery.

You will first be instructed on Murder of the Second Degree. Keep in mind that

all of the elements of Second Degree Murder are necessary to prove First Degree Murder.

To establish Second Degree Murder, the Prosecution must prove each of the following elements beyond a reasonable doubt: (35) First, that the deceased died on or about October 29th, 1978, within the city of Detroit.

Second, that the deaths were caused by acts of the Defendants or that the Defendants consciously created a very high degree of risk of death to another with the knowledge that it probably would cause death.

Third, if you find that the deaths were caused by the Defendants, you must determine whether the Defendants are guilty of any crime. The killing of one human being by another may be entirely innocent. It is not the act of killing in itself which makes it a crime, but the

state of mind with which it is done.

Fourth, for Murder, you must find that the Defendants consciously and knowingly performed the act which caused death. The Defendants must have either intended to kill, that is they must have done the act intending that it result in death, or great and serious bodily injury, or they must have knowingly created a very high risk of death with the knowledge that it probably would cause death. The degree of risk for murder must be so reckless and wrongful as to amount to a criminal purpose aimed against a person's life and the Defendants must have been conscious of that risk.

For Murder of the First Degree, the Prosecutor must prove beyond a reasonable doubt the four elements of Second Degree Murder which have been described to you. In addition, he (36) must prove beyond a reasonable doubt the fifth element which

raises the crime to First Degree Murder.

Fifth, that at the time of the act which caused the deaths of Ollie Scott and Koran Knighton, the Defendants were committing, attempting to commit, or assisting another in the commission of the crime of robbery.

For the crime of robbery, the Prosecution must prove each of the following elements beyond a reasonable doubt.

First, that the Defendant assaulted Ollie Scott. An assault is an attempt or a threat with force and violence to do immediate bodily harm to another by one who has the apparent present means of doing such harm.

Second, that at the time of such assault the Defendant was armed with a dangerous weapon or with an article used or fashioned in a manner to lead the person so assaulted to reasonably believe

it to be a dangerous weapon.

Third, that at the time of such assault Defendants took the money or property alleged to have been taken, money or property which did not belong to the Defendants.

Fourth, that this money was taken from the person or in the presence of Ollie Scott.

The from his person or in his presence element is established by proof of violence or putting in fear of violence being used to take possession or control over the property.

Fifth, the property taken must have been of some (37) value, but the extent of the value makes no difference. The amount of money taken makes no difference.

Sixth, there must have been some movement of the property in order to make the crime complete. However, any

movement of the property by anyone is enough.

Seventh, at the time of the taking the Defendants must have intended to deprive Ollie Scott of the property taken.

Robbery Armed also includes the lesser included offense of Attempt Robbery Armed. To establish an attempt, the Prosecution must prove first that the Defendants intended to commit the crime of robbery.

Second, that the Defendants performed an act toward committing that crime. Not every act is sufficient to constitute an attempt. In determining whether or not the Defendant performed an act sufficient to constitute an attempt, it is necessary to distinguish between mere preparation on the one hand, the actual start of the doing of the criminal deed on the other. Mere preparation, which might consist of planning the offense, or doing some act

which might be innocent in itself, is not enough. However, if the act or acts of the Defendants can lead only to one end, that is they cannot within reason be regarded as pointing to any other purpos- than the commission of the crime charged here, then they constitute an attempt. Such end must be clearly indicated beyond a reasonable doubt. The Defendants must have been either committing or assisting another in the commission of the crime. (38)

If you find that the Defendants consciously intended to commit, attempt or assist another in the crime of Robbery, you may infer that he knowingly created a very high risk of death with knowledge that it probably would cause death.

Is that sufficient for which you --

FOREMAN SHOEFELD: Yes.

THE COURT: At this time you may

return to the juryroom to continue your deliberations.

(Whereupon, at 3:10 o'clock p.m., Jury returned to juryroom to continued deliberations.)

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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee,

v

CLARISSA MARSH and BENJAMIN WILLIAMS

Defendants-Appellants.

Dated Dec. 17, 1980
Docket Nos. 45451; 46128

BEFORE: R.M. Maher, P.J., and Bronson and T.C. Quinn, JJ.

PER CURIAM

Defendants were both convicted after a joint jury trial of two counts of first-degree felony murder, MCL 750.316; MSA 28.548, and one count of assault with intent to murder, MCL 750.83; MSA 28.278. They were both sentenced to life imprisonment on each of the first-degree felony murder convictions and both were also sentenced to prison terms of from 60 to 90 years on the assault convictions. The defendants appeal by right and their

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appeals have been consolidated.

Both defendants argue that the trial court erred in denying their motions for directed verdicts. They first argue that the trial court erred in applying the "any evidence" standard. Well after the trial in the instant case, the Supreme Court rejected the "any evidence" standard and held instead that the trial court, when ruling on a directed verdict motion, must consider the evidence presented by the prosecution up to time the motion is made, view the evidence in the light most favorable to the prosecution, and then determine whether a rational trier of fact could find the essential elements of the offense proven beyond a reasonable doubt. People v Hampton, 407 Mich 354, 368; 285 NW2d 284 (1979). We need not address the question of whether Hampton applies, because even under Hampton's broader standard the

evidence was sufficient to survive the directed verdict motion.

With regard to defendant Williams and the felony murder charges, he argues that there was an insufficient showing that a robbery or attempted robbery took place, so that the element of an underlying felony was absent. We disagree. The evidence showed that when Williams entered the house he was armed and asked "where's the money". His statement to the police, which was introduced into evidence during the prosecution's case-in-chief, indicated that the (sic) had discussed a robbery with Kareem Martin before arriving at Ollie Scott's house, and that he helped Martin collect two bags of money from the upper level of the house where Scott had been taken at gunpoint. One of the victims, Cynthia Knighton, testified she heard the sound of drawers being opened and closed while

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Williams was upstairs. Officer Porter testified that the house appeared to have been ransacked. This was sufficient, when viewed in the light most favorable to the prosecution, to justify a reasonable trier of fact in finding that a robbery or attempted robbery took place.

Williams also argues his motion for directed verdict should have been granted as to the murder charges because the prosecution did not meet its burden on the element of malice. A split of opinion still exists on this Court over the issue of whether, in a felony-murder case, malice may be imputed from the underlying felony or merely inferred from the circumstances surrounding the killing, including the underlying felony. See, e.g, People v Till, 80 Mich App 16; 263 NW2d 586 (1977), People v Fountain, 71 Mich App 491; 248 NW2d 589 (1976),

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Sidney, The Felony Murder Doctrine in Michigan, 25 Wayne L Rev 69 (1978), Saltzman, Does Michigan Have a Felony Murder Rule, 59 Mich Bar J 97 (1980). [1] We believe Fountain presents the better view and hold that malice may not be imputed, as a matter of law, from the underlying felony. Accordingly, the evidence presented at the time of the motion had to sufficiently show that Williams acted with the intent to kill or in reckless disregard of a known and high degree of risk that death or serious bodily harm might occur. [2] People v Langston, 86 Mich App 656, 660; 273 NW2d 99 (1978). See People v Hicks, 88 Mich App 675, 677 fn 1; 279 NW2d 45 (1979), held in abeyance, 406 Mich 984 (1979). We believe the evidence was sufficient. Taken in the light most favorable to the prosecution, the evidence showed that Williams knowingly participated in an

armed robbery. He ordered Knighton and her son to lie on the floor. In addition, Knighton testified that Williams ordered her and her son into the basement, where the shottings (sic) took palce (sic), and that Martin told Williams "We're going to have to hurt them". Although there was other evidence to the contrary, we believe the evidence was sufficient for the case to survive a motion for directed verdict.

Williams makes a similar argument with regard to the assault charge, claiming that the evidence was insufficient on the element of his intent to murder. The evidence showed defendant knowingly participated in a robbery and was informed that the victims might have to be harmed. There was also evidence to show he aided Martin in bringing the assault victim, Knighton, into the basement and that he knew Martin intended

to "hurt" her. Williams' statement indicated that when Martin picked him up Martin informed him that after the robbery they would have to "take them out". This was sufficient to show that Williams aided and abetted Martin with the knowledge that Martin had the specific intent to murder Knighton. People v Fields, 64 Mich App 166, 173-174; 235 NW2d 95 (1975), lv den 397 Mich 861 (1976).

Defendant Marsh raises substantially similar arguments in her appeal. As to the felony murder charges, she argues the evidence was insufficient to show a robbery or attempted robbery took place. Even without Williams' statement, which is inadmissible as to Marsh, we believe the evidence was sufficient to show the underlying felony. Knighton testified that when Marsh and Martin entered the house Martin pulled out a gun. Williams

was admitted shortly thereafter by Marsh, and he also had a gun. When Williams entered the house, he asked "where's the money". Martin took Scott upstairs, and was soon joined by Williams. Knighton then heard the sound of drawers and doors being opened and closed. When the trio came back downstairs, Marsh was given a paper bag with something in it. Officer Porter testified that two of the upstairs bedrooms had been ransacked. While he also testified that he found a box upstairs containing money and savings bonds, we believe the evidence was sufficient. Additional evidence of Marsh's participation in the robbery was established through testimony that she appeared to be standing guard by the door, opening the door for Williams, and through testimony that she blocked Knighton's attempted escape from the house.

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On the issue of malice, we believe the circumstances surrounding the apparent robbery were sufficient to establish malice for purposes of meeting a directed verdict motion. The evidence indicated that Marsh knowingly participated in an armed robbery in reckless disregard of circumstances that indicated a high degree of risk that death or serious bodily harm could result. See People v Langston, supra, 661.

As to the assault charge, the issue is whether the evidence was sufficient to show that Marsh aided and abetted the assault with the specific intent to murder Knighton, or with the knowledge that Martin had this specific intent. People v Fields, 64 Mich App 166, 173-174; 235 NW2d 95 (1975), lv den 397 Mich 861 (1976). This intent may be inferred from circumstantial evidence. Id. Marsh's case presents a much closer

question on this issue than does Williams'. There was no testimony indicating she harbored an intent to murder Knighton, nor was there any showing that she heard Martin's statements regarding the need to "hurt" or "take out" the victims. There was, in addition, no testimony placing her in the basement, the scene of the shootings. The evidence does indicate, viewed in the light most favorable to the prosecution, that she was aware that Williams and Martin were armed, that she served as a guard or "lookout" at the door, that she prevented an attempted escape by Knighton, and that she was given the paper bag thought to contain the proceeds of a robbery. The evidence also indicates that Marsh knew Scott, supporting the inference that it was Marsh who allowed Martin to gain entrance. While it is a close question, we believe the evi-

dence presented at the time of the motion was sufficient to survive a motion for directed verdict. This case is similar to People v Poplar, 20 Mich App 132, 139-140; 173 NW2d 732 (1969). In Poplar, the defendant allegedly acted as a lookout while two companions, whom he knew to be armed, broke into a civic recreation building. The two were discovered by the manager of the building, who was then shot in the face with a shotgun. The defendant was convicted of assault with intent to murder and on appeal alleged that the trial court erred in denying his motion for directed verdict. [3] The Poplar court noted that there was no evidence that the defendant harbored an intent to murder. It was held, however, that the jury could infer from the fact that defendant knew his companions were armed that defendant also knew they might use

the gun in attempting to murder someone if they were discovered. A similar analysis may be applied to the instant case. Marsh knew that both Williams and Martin were armed. She helped them to gain entrance, served as a lookout, and prevented Knighton from escaping. From these facts, along with the other facts and circumstances adduced prior to the motion, the jury might infer that Marsh also knew ~~that~~ Martin had the specific intent to murder Knighton.

By way of supplemental briefs, the defendants argue that the trial court erred in instructing the jury on felony murder by removing the element of malice from the jury's consideration. As noted above, although a split exists in this Court on this precise issue we believe People v Fountain, supra, presents the better view. Accordingly, the trial court must instruct the jury that malice,

express or implied, must be proven by the prosecution beyond a reasonable doubt before a defendant may be convicted of felony murder. The element of malice may not be imputed, as a matter of law, from the underlying felony. Once a common-law (second-degree) murder is established, the underlying enumerated felony serves to elevate that murder to murder in the first degree. See footnote 2, supra.

In the instant case, the trial court instructed that murder is the killing of one person by another with malice. The court then defined malice, both express and implied. The jury was then instructed that first-degree murder required an additional element, namely that at the time of the act which caused the deaths the defendants were committing or attempting to commit the crime of robbery. The trial court instructed the jury on the elements of a robbery, of

certain lesser included offenses of robbery, and on the law of attempts. Instructions were also given on aiding and abetting. At this point, the trial court gave the instruction that is specifically challenged on appeal:

> "For Murder in the First Degree there must be proof beyond a reasonable doubt that the killing occurred as a result of the crime of robbery and that the Defendants were at the time engaged in committing or attempting to commit or aiding another in the commission of that crime." (Emphasis added.)

Defendants argue that because this instruction refers to a killing in the course of a felony, rather than to a murder, the element of malice was removed from the jury's consideration. We disagree. The instruction is not incorrect as far as it goes. It is true that "[f]or murder in the First Degree there must be proof beyond a reasonable doubt that the killing occurred as a result of" an underlying felony. In

addition, there must be proof of malice and the trial court adequately instructed the jury on this point. Indeed, immediately following the challenged instruction the trial court reminded the jury that malice is an element of murder. If the trial court had instead instructed that murder in the first degree is completely established on proof of a killing in the course of an enumerated felony then the trial court's instructions would have been conflicting. Given, however, the trial court's extensive references to the necessity of malice and the fact that the challenged instruction is not incorrect, the instructions were not inconsistent and were correct when read as a whole. People v Beard, 78 Mich App 636; 261 NW2d 27 (1977) lv den 402 Mich 930 (1978).

Defendant Marsh argues she was denied her constitutional right to confrontation

by the admission of codefendant Williams' statement when Williams did not take the stand. The United States Supreme Court has held that a defendant's Sixth Amendment confrontation right is violated when the statement of a non-testifying codefendant which incriminates the defendant is admitted in a joint trial. Bruton v United States, 391 US 123; 88 S Ct 1620; 20 L Ed 2d 476 (1968). In the instant case, the statement was "Brutonized" by the deletion of any references to Marsh. The statement was read to the jury without any gaps, and without any mention of Marsh. In addition, the trial court instructed that the statement was not evidence against Marsh. [4] Nevertheless, Marsh argues that the other evidence presented at trial, including her own testimony, linked her as closely to the substance of the statement as she would have been if

the references to her participation had not been deleted.

Elimination of references to a defendant has long been an accepted method of eliminating the problems raised in Bruton. E.g., People v Macklin, 46 Mich App 297, 302; 208 NW2d 62 (1973), lv den 393 Mich 764 (1974). As edited, the statement in this case satisfied Bruton and was admissible. United States v Belle, 593 F2d 487, 493 (CA 3, 1979).

Defendant Williams argues the trial court erred in refusing to suppress evidence of Knighton's identification of him pursuant to a counseless photographic display conducted at the hospital while he was in custody.

Subject to certain exceptions, a photographic identification procedure should not be used when a defendant is in custody and available for a line-up. When the circumstances warrant the use of

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photographs, a defendant still has the right to have counsel present at the identification, again subject to certain exceptions. People v Till, 406 Mich 641, 644; 281 NW2d 297 (1979), People v Anderson, 389 Mich 155, 186-187; 205 NW2d 461 (1973). Because it is undisputed that Williams was in custody during the photographic display and that counsel was not present at the time, the issue becomes whether any of the exceptions to these requirements existed.

The existence of an emergency situation which requires immediate identification constitutes an exception to both requirements. People v Anderson, supra, 186-187 fn 22-23. In the instant case, the prosecution points to the testimony of Sergeant Harris, who stated that he spoke with the doctor treating Knighton at Mr. Carmel Hospital about the possibility (sic) of conducting a

line-up. Harris testified that the doctor replied that it might not be possible since Knighton was in critical condition and was not expected to live. Harris then asked if he could come to the hospital in order to show Knighton some photographs and the doctor replied that he could try. Harris then went to the hospital with Sergeant Taylor and several photographs and after waiting between 30 and 45 minutes were allowed to see Knighton after being told she was still in critical condition. Knighton was unable to speak, but the photographs were placed in front of her and she pointed to the picture of Williams.

On appeal, Williams claims that there was no competent evidence to show that Knighton's condition justified the use of photographs and the lack of counsel. He claims that Harris' testimony on her condition amounted to hearsay. We agree

with the prosecution that the testimony was not hearsay because it was not used to prove that Knighton was in fact in critical condition and not expected to live, but rather was used to show the basis on which the police decided to use photographs instead of a line-up. See MRE 801(c).

We believe the trial court correctly refused to suppress evidence of the identification. Knighton was the only victim who was still alive and the circumstances demanded immediate action. The use of photographs and the lack of counsel were, therefore, justified.

Finally, defendant Williams argues that the trial court erred in failing to order separate trials. There is no absolute right to separate trials. People v Hurst, 396 Mich 1, 6; 238 NW2d 6 (1976). Nevertheless, separate trials should be held when the defenses are

antagonistic. People v Miller, 88 Mich App 210, 222; 276 NW2d 558 (1979). The decision on a request for severance rests in the sound discretion of the trial court and will be reversed on appeal only for an abuse, which requires an affirmative showing of prejudice to the substantial rights of the accused. People v Miller, supra, People v Clark, 85 Mich App 96, 101; 270 NW2d 717 (1978). See MCL 768.5; MSA 28.1028. Such a showing is made where the defenses are shown to be truly antagonistic, People v Hurst, supra, but it is not made where the defenses are not shown to be antagonistic, but merely different. People v Carroll, 396 Mich 408, 414; 240 NW2d 722 (1976), People v Walter Moore, 78 Mich App 294, 298-300; 259 NW2d 351 (1977).

We do not believe that the defenses presented by Marsh and Williams were

MICHIGAN COURT OF APPEALS OPINION

antagonistic or inconsistent. Marsh argued that her participation in the robbery was under duress and that she left before any shooting took palce (sic). Based on closing arguments, Williams' defense appears to have been that he did not shoot the victims and that he did not intend to participate in the killings. Although Marsh's testimony differed from the statement given by Williams to a limited extent, this inconsistency did not result in a situation where the defendants were inculpating each other. The defenses presented by each defendant tended to inculpate the absent Martin, rather than each other. Accordingly, the trial court did not err in refusing to grant separate trials.

Having found no reversible error, the defendants' convictions are affirmed.

Affirmed.

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[1] The Supreme Court has granted leave to consider this issue. See, e.g., People v Wright, 402 Mich 938 (1978), People v Thompson, 402 Mich 938 (1978).

[2] The Supreme Court has held that non-felony first-degree murder requires a showing of express malice, that is, a showing of an actual intent to kill. People v Garcia, 398 Mich 250, 259; 247 NW2d 547 (1976). The same is not true in first-degree felony murder, where implied malice is sufficient. People v Langston, 86 Mich App 656, 660; 273 NW2d 99 (1978). The distinction is based on the fact that under the statute common law murder (which requires either express or implied malice) is elevated to murder in the first degree on proof of certain additional elements. See MCL 750.316; MSA 28.548. If it is elevated on a showing that the murder was "wilful, deliberate, and premeditated" then it follows that the malice must be express. If, on the other hand, it is elevated on a showing that the murder occurred during the course of an enumerated felony this additional element does not limit the nature of the malice which must be shown and either express or implied malice will suffice. People v Hill, 94 Mich App 777; 288 NW2d 408 (1979), People v Wright, 80 Mich App 172, 178-179; 262 NW2d 917 (1977), lv gtd, 402 Mich 938 (1978).

[3] The Court in Poplar addressed the issue in terms of what the jury could reasonably infer from the evidence. It thus appears that the Court was applying a standard more akin to that in Hampton rather than the now discredited "any evidence" standard.

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[4] Such a cautionary instruction is not, by itself, sufficient to overcome the violation of confrontation rights. Bruton v United States, supra.

Supreme Court, U.S.
FILED
AUG 6 1986
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(3)

No. 85-1433

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1985

GLORIA RICHARDSON, WARDEN
Petitioner

vs.

CLARISSA MARSH
Respondent

ON WRIT OF CERTIORARI
TO THE SIXTH CIRCUIT COURT OF APPEALS

BRIEF FOR PETITIONER

WAYNE COUNTY PROSECUTOR'S OFFICE

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STATEMENT OF THE QUESTION

WERE ANY RIGHTS SECURED RESPONDENT BY THE CONFRONTATION CLAUSE VIOLATED AT HER JOINT TRIAL BY THE ADMISSION INTO EVIDENCE AGAINST RESPONDENT'S CODEFENDANT OF HIS REDACTED CONFESSION, WHERE THE CONFESSION AS REDACTED NEITHER IMPLICATED RESPONDENT NOR EVEN SUGGESTED HER EXISTENCE; FURTHER, UNDER CONSTITUTIONAL CONFRONTATION PRINCIPLES, COULD THE CONFESSION PROPERLY HAVE BEEN ADMITTED AGAINST RESPONDENT SUBSTANTIVELY AS A DECLARATION AGAINST PENAL INTEREST IN ANY EVENT?

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The opinion of the Federal District Court is appended as Appendix A to the Petition for Certiorari. The opinion of the Sixth Circuit Court of Appeals is reported at 781 F 2d 1201 (CA 6, 1986).

STATEMENT OF JURISDICTION

The judgment of the Sixth Circuit of the Court of Appeals was entered on January 23, 1986. The jurisdiction of this Court is invoked under 28 USC Sec 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> ...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor

> deny to any person within its jurisdiction the equal protection of the laws.

The Sixth Amendment to the United States Constitution provides, in part, that "in all criminal prosecutions the accused shall enjoy the right...to be confronted with the witnesses against him."

STATEMENT OF THE CASE

Respondent Marsh was tried jointly with her co-defendant Benjamin Williams pursuant to an information charging her with the felony murder of Ollie Scott and Koran Knighton in the perpetration of a robbery pursuant to Mich. Comp. Laws Ann. Sec. 750.316 and with assault of Cynthia Knighton with intent to murder pursuant to Mich. Comp. Laws Ann. Sec. 750.83.

Cynthia Knighton testified that on October 29, 1978, she went with her son to the house of her aunt, Ollie Scott. Knighton was upstairs with her son when she heard voices downstairs, and came downstairs and saw Martin (Marsh's boyfriend), and Marsh. Scott introduced Knighton to Marsh, they all sat down and conversed, and Marsh said she had come to pick something up. Martin pulled out a gun, pointed it at them, and said "someone had gotten killed and that my

aunt knew something about it." Marsh said something similar, and walked over to the front door. Martin grabbed Scott, and Marsh looked out the peephole. The doorbell rang and Marsh let in defendant Williams, holding a handgun. Williams said "I'm so-and-so's brother," and "[w]here's the money?"(JA 28-43)

Martin took Scott upstairs, and Williams walked through the lower level of the house, at which time Knighton attempted to flee through the front door. Marsh grabbed her and held her until Williams returned, whereupon he told the Knightons to lay on the floor (JA 47-48). Williams went upstairs and Marsh refused to give Knighton a drink of water, but looked out the peephole. When the three came downstairs, Martin gave Marsh a paper grocery bag (JA 54-55). Martin took Scott to the basement and Williams took the Knightons into the basement.

Williams said "Hurry up and tie them up," and Martin said "We're going to have to hurt them." Knighton heard two shots. Then Martin, holding a blanket in front of his gun, shot Knighton three times. Thereafter, she telephoned the police (JA 58-79). Knighton testified that Williams had a long black gun, and Martin a short, fat, shiny one (JA 41-42).

Defendant Marsh objected at trial to the introduction of Williams' statement to the police even after the references to Marsh had been deleted: "[T]here are certain inferences that are raised by this statement even in its altered form that would tend to incrimirate my client" (JA 91). The court overruled Respondent's objection and allowed introduction of Williams' statement as follows:

> On Sunday evening, October the 29th, 1978, at about 6:30 p.m., I was over to my girl friend's house at 237 Moss, Highland Park, when I

received a phone call from a friend of mine named Kareem Martin. He said he had been looking for me and James Coleman, who I call Tom. He asked me if I wanted to go on a robbery with him. I said okay. Then he said he'd be by and pick me up. About 15 or 20 minutes later Kareem came by in his black Monte Carlo car. I got in the car and Kareem told me he was going to stick up this crib, told me the place was a numbers house. Kareem said there would be over $5,000 or $10,000 in the place. Kareem said he would have to take them out after the robbery. Kareem had a big silver gun. He gave me a long barrelled .22 revolver. We then drove over to this house and parked the car across the big street near the house. The plan was that I would wait in the car in front of the house and then I would move the car down across the big street because he didn't want anybody to see the car. Okay, Kareem went up to the house and went inside. A couple of minutes later I moved the car and went up to the house. As I entered, Kareem and this older lady were in the diningroom, a little boy and another younger woman were sitting on the couch in the front room. I pulled my pistol and told the younger woman and the little boy to lay on the floor. Kareem took the older lady upstairs. He had a pistol, also. I stayed downstairs with the two people on the floor. After Kareem took the lady upstairs I went upstairs and the lady was laying on the bed in the room to the left as you get up the stairs. The lady had already given us two bags full of money

> before we even got upstairs. Kareem had thought she had more money and that's why we had went upstairs. Me and Kareem started searching the rooms but I didn't find any money. I came downstairs and then Kareem came down with the lady. I said, "Let's go, let's go." Kareem said no. Kareem then took the two ladies and little boy down the basement and that's when I left to go to the car. I went to the car and got in the back seat. A couple minutes later Kareem came to the car and said he thinks that the girl was still living because she was still moving and he didn't have any more bullets. He asked me how come I didn't go down the basement and I said I wasn't doing no shit like that. He then dropped me back off at my girl's house in Highland Park and I was supposed to get together with him today, get my share of the robbery after he had counted the money. That's all (JA 119-123).

The court delivered the following instruction to the jury.

> The statement of co-defendant Williams has been admitted into evidence against him only. I caution you that it may be used in considering only the guilt or innocence of Defendant Benjamin Williams. Under the rules already given to you, it must not be used or considered in any way against Defendant Clarissa Marsh (JA 125-127).

Marsh testified that she met Martin in 1977 and had a relationship with him. Marsh testified that she often borrowed money so that Martin could purchase drugs. Martin lived in Marsh's house and refused to leave at her direction. Martin physically abused Marsh and in June 1978 she was hospitalized following a suicide attempt. Marsh worked with and borrowed money from Ollie Scott in the summer of 1978.

On October 29, 1978, Marsh lost her wallet with Martin's drug money at Eastland Shopping Center. Martin was upset and suggested that Marsh borrow money from Scott. After dropping her children off at a Halloween party, Marsh and Martin picked up Williams. Respondent stated that during the drive to Scott's house, she heard no conversation about a robbery (JA 171). Martin and Marsh went to Scott's house where Marsh asked for a loan. Martin

pulled a gun out and Marsh walked over to the door. Marsh testified that she looked out the door to see where the car was, that she did not feel free to leave, and that she opened the door to let Williams in. Marsh testified that she did not try to escape because she was scared and Marsh admitted that she blocked Knighton's attempt to escape but does not know why or what happened (JA 176-185). Martin came downstairs and handed Marsh a bag. Marsh testified that she never heard anything said about anyone being hurt, shot or killed (JA 186). After Martin, Williams and the victims went into the basement, Marsh left the house without the bag. Marsh testified that she never intended to rob or kill anyone, and that she did not know that anyone was armed (JA 196).

In closing argument, the prosecutor noted:

[T]he same law that applies to Mr.

> Williams applies to Clarissa Marsh as well. The People must prove the same elements that I talked about in my discussion about Mr. Williams. Her guilt, of course, is to be determined separately from the evidence but you may consider the same evidence that you heard from the witness stand. The only thing that the Court will instruct you that you cannot consider is that statement that was made by the Defendant Williams. You cannot consider that statement when you determine her guilt or innocence. To do so would be unfair (JA 318-319).

Further,

> [i]t's important in light of her testimony when she says Kareem drives over to Benjamin Williams' home and picks him up to go over. What's the thing that she says?" "Well, I'm sitting in the back seat of the car." "Did you hear any conversation that was going on in the front seat between Kareem and Mr. Williams?" "No, couldn't hear any conversation. The radio was too loud." I asked you whether that is reasonable. Why did she say that? Why did she say she couldn't hear any conversation? She said, "I know they were having conversation but I couldn't hear it because of the radio." Because if she admits that she heard the conversation and she admits to the plan, she's guilty of at least armed robbery. So she can't tell you that. How else do you know that she planned the robbery and

> was guilty of First Degree Felony Murder as well as the robbery? (JA 326-327).

There followed a lengthy argument that the evidence demonstrated involvement in a planned crime on the part of Marsh, the prosecutor arguing: her conduct after Kareem Martin pulled a gun demonstrated no surprise and indeed advance knowledge the event would occur; Respondent's actions in going to the door indicated she was to be a lookout, was to prevent escape, and was to let Williams into the house; that her conduct indicated she knew Williams would be coming to the door, and she admitted him without question, <u>after</u> Martin had pulled his gun; perhaps most importantly, that when Cynthia Knighton tried to escape with her son Respondent grabbed her and held her and prevented the escape; that a bag of stolen items was handed to Respondent by Martin and Williams after they came down-

stairs; and that both Martin and Williams, after having pulled weapons and started the robbery, went upstairs with Ollie Scott to search for money, leaving Respondent downstairs alone with Cynthia Knighton and her son (JA 326-335). As the prosecutor stated, Respondent's participation in the entire scheme was demonstrated by the fact that Williams and Martin "had enough confidence to leave her alone downstairs with Cynthia Knighton" (JA 334).

Defense counsel argued that "[y]ou never heard anything about anyone saying anything in her presence about hurting anyone." In its instructions to the jury, the court repeated its instruction limiting the admissibility of the Williams statement (JA 393-394).

On April 23, 1979, Williams and Marsh were convicted on all counts. On May 2, Marsh was sentenced to life imprisonment on the first and second counts and 60 to

90 years on the third count. On December 17, 1980, the Michigan Court of Appeals affirmed the convictions. The court found that malice could be inferred from Marsh's admission of Williams into the home, Marsh's holding of the grocery bag, Marsh's guarding of the door, and Marsh blocking Knighton's escape. Further, "[t]he evidence indicated that Marsh knowingly participated in an armed robbery in reckless disregard of circumstances that indicated a high degree of risk that death or serious bodily harm could result" (JA 450). The court also rejected Marsh's Sixth Amendment argument. On February 5, 1982, the Michigan Supreme Court denied Marsh's application for leave to appeal, and, on April 30, denied her motion for reconsideration.

On July 6, 1983, Marsh filed her petition for a writ of habeas corpus. On October 11, 1983, the district court

denied the petition. The Sixth Circuit Court of Appeals reversed on Sixth Amendment confrontation grounds, and this Court then granted Petitioner's Petition for a Writ of Certiorari.

SUMMARY OF ARGUMENT

Respondent was convicted at a joint trial at which the confession of a nontestifying codefendant was admitted. That confession was redacted so as to delete not only any references to Respondent, but any indication that another actor, other than one Kareem Martin, who was still at large at the time of trial, was involved in any way in the crime, a double felony-murder, and an assault with intent to murder (as one intended victim survived).

The surviving victim testified in a manner detailing Respondent's involvement in the crime once she and Martin entered the house, including the fact that Respondent grabbed her and held her when she tried to escape with her four year old son (who was one of the murder victims), and that Respondent was left downstairs in the home alone with the surviving victim and her son while Martin

and the confessing codefendant, Williams, searched the upstairs, having taken the surviving victim's aunt, Ollie Scott, upstairs with them.

The confession of Williams indicated that the robbery-murders were planned in an auto on the way to the house in question. Respondent herself testified that she was in the auto at the time, but did not hear any conversation because she was in the back seat and the radio was on. She confirmed her participation in the house, but stated that she had been afraid of Kareem Martin.

The Petitioner submits that in this circumstance, where the redacted confession on its face does not in any way incriminate the defendant, no confrontation problems arise. There exists a strong presumption that jurors understand instructions and will follow

them. Outside of the context of Bruton v United States, where the codefendant's confession directly and powerfully incriminated the nonconfessing defendant, the presumption should be followed. This is the view of the majority of the circuits, and contrary to the view of the Sixth Circuit, which follows a doctrine of "evidentiary linkage" or "contextual implication."

Petitioner also submits that even if the presumption that jurors follow instructions is viewed as overcome in this case, Respondent's confrontation rights nonetheless remain inviolate. The codefendant's confession, as redacted or unredacted, through its content and the surrounding circumstances, demonstrated substantial indicia of reliability so as to be admissible against Respondent as a declaration against penal interest.

For these reasons, the Sixth Circuit should be reversed.

NO RIGHTS SECURED RESPONDENT BY THE CONFRONTATION CLAUSE WERE VIOLATED AT HER JOINT TRIAL BY THE ADMISSION INTO EVIDENCE AGAINST RESPONDENT'S CODEFENDANT OF HIS REDACTED CONFESSION, WHERE THE CONFESSION AS REDACTED NEITHER IMPLICATED RESPONDENT NOR EVEN SUGGESTED HER EXISTENCE, AND WHERE, UNDER CONSTITUTIONAL CONFRONTATION PRINCIPLES, THE CONFESSION COULD PROPERLY HAVE BEEN ADMITTED AGAINST RESPONDENT SUBSTANTIVELY AS A DECLARATION AGAINST PENAL INTEREST.

Introduction

On October 30, 1978, as the culmination of a robbery, and as part of a preconceived design, Ollie Scott and four year old Koran Knighton were executed. Cynthia Knighton, Koran Knighton's mother, was also an intended murder victim; however, despite having been shot three times, she survived to testify against the perpetrators of these heinous crimes. One of these, Benjamin Williams, confessed. That confession was devastating as to Williams, as it admitted his role in the events, and that it was a part of the robbery plan that the victims

be killed. The confession named Kareem Martin[1] as the shooter, and Respondent's participation in the events was fully detailed, including her presence with Williams and Martin in an auto when the robbery plan, which included killing the victims, was discussed.

To avoid severance, and yet satisfy Bruton v United States, 391 US 123 (1968), the confession was redacted. The confession was not, however, redacted by replacing Respondent's name with a letter or a neutral pronoun. Instead, all references to the participation of a person other than Williams and Martin were completely eradicated (JA 102-106). From the confession standing alone, a jury could not have known a third individual had been involved in any way in the

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[1] Kareem Martin was apprehended, tried, and convicted for these offenses approximately one year ago.

crimes, or that the confession had been at all redacted.

After an unsuccessful state appeal, Respondent's petition for habeas corpus was denied by the district court, which noted that "the redacted confession entered into evidence neither mentioned (Marsh) by name nor inculpated anyone else other than Martin" (emphasis added, Petition for Certiorari, 4A), and rejected a "contextual implication" argument. The Sixth Circuit reversed, "reject(ing) the approach which limits the appraisal of the inculpatory value of an extrajudicial statement to the face of the statement itself" (Petition for Certiorari, 50A), and observing that six circuits have taken a view contrary to that it was espousing (Petition for Certiorari, 62A-65A). The panel found "especially pertinent" to its finding of a constitutional confrontation violation "1)that the prosecution in closing

argument pointed out the impermissible linkage to the jury, 2)that the killings were discussed in the car provided evidence of Marsh's knowledge of a plan encompassing murder, and 3)that intent or malice is a critical element of both offenses under Michigan law"[2] (Petition for Certiorari, 52A).

Petitioner contends, for reasons to be detailed below, that the Sixth Circuit erred. Petitioner will argue first that the doctrine of "evidentiary linkage" or "contextual implication" embraced by the panel has no proper place in confrontation jurisprudence, particularly in a case where the codefendant's confession as redacted does not indicate even the existence of a third actor, and where the

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[2] The two offenses referred to are felony murder, and assault with intent to murder on Cynthia Knighton, as she survived the assault.

alleged linking evidence is the testimony of Respondent herself! Moreover, it will be argued that even if there is found a substantial risk that the jury disregarded two cautionary instructions and considered the codefendant's redacted confession as evidence against Respondent, confrontation principles would not be compromised, for the confession from an unavailable declarant contained substantial indicia of reliability, so as to render it, for constitutional purposes, admissible against Respondent substantively as a declaration against penal interest.

I. "CONTEXTUAL IMPLICATION" OR "EVIDENTIARY LINKAGE"

A. The Bruton Exception and its Premise

In undertaking an analysis of constitutional questions, it is always wise to keep the text of the constitutional provision involved firmly in mind, to the

end that one avoids engaging only in an interpretation of a previous analysis, which itself expressed a particular point of view, rather than an analysis of the constitution, with a result that may have little relation to the actual language of the constitution itself. Involved in this case is a confrontation question. The Sixth Amendment to the United States Constitution provides, in part, that "in all criminal prosecutions the accused shall enjoy the right...to be confronted with the witnesses against him."

In this case the codefendant's confession was <u>not</u> admitted into evidence "against" Respondent, but was limited by the court's instructions to admission against the confessing codefendant Williams. Williams, through his confession, then, was not directly a "witness against" Respondent, given the limiting instruction, and the general rule, without which the jury system makes

little sense, is that the jury can and must be trusted to follow the court's instructions where those instructions are clear. See 391 US at 135. Indeed, in Francis v Franklin, US , 85 L Ed 2d 344, 350-360, fn 9 (1985) this Court stated that it "presumes that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them." This principle applies equally as fully in cases where the confrontation clause is implicated. See Tennessee v Street, US ; 105 S Ct 2078, 2082, fn 6 (1986); Frazier v Cupp, 394 US 731 (1969).

The issue confronted by this Court in Bruton was whether to create an exception to this rule--"whether the conviction of a defendant at a joint trial should be set aside although the jury was instruc-

ted that a codefendant's confession inculpating the defendant had to be disregarded in determining his guilt or innocence" (emphasis added, 391 US at 123-124). In Bruton the codefendant's confession named defendant as his accomplice in the armed robbery. This Court observed that if it was in fact reasonably possible for the jury to follow instructions to "disregard the confessor's extrajudicial statement that his codefendant participated with him in committing the crime" (emphasis added, 391 US at 126, quoting Delli Paoli v United States), no confrontation issue would arise, because the case would be treated as if the confessor "made no statement inculpating the nonconfessor." 391 US at 126. In overruling Delli Paoli this Court determined that it is not reasonably possible for a jury to follow a limiting instruction in a case such as the one then before it, there being a

great likelihood that "the jury would believe Evans made the statements and that they were true--not just the self-incriminatory portions but those implicating petitioner as well" (emphasis added, 391 US at 127). The presumption that the jury can and will follow a limiting instruction is simply overcome in a case where the codefendant's confession is "powerfully incriminating" of the defendant, particularly given the recognized motivation to shift blame to others. See 391 US at 135-136. Bruton was thus "denied his constitutional right of confrontation" as Evans did not take the stand at trial (it should be observed that this Court carefully noted that "the hearsay statement inculpating petitioner was clearly inadmissible against him under traditional rules of evidence....we intimate no view whatever that such exceptions necessarily raise questions under the Confrontation Clause...." 391

US at 128, fn 3, a point to which Petitioner will return in part II of the argument). See also Lee v Illinois, US ; 106 S Ct 2056 (1986), stating that the premise of Bruton was "that a confession that incriminates an accomplice is so 'inevitably suspect' and 'devastating' that the ordinarily sound assumption that a jury will be able to follow faithfully its instructions could not be applied" (emphasis added, 106 S Ct at 2063).

In Parker v Randolph, 442 US 62 (1979) this Court dealt with a variant of the factual situation presented in Bruton; namely, a case where not only had the codefendant confessed and implicated the defendant in the crime, but the defendant had also confessed, with the confessions of both defendants consistent or "interlocking." Justice Rehnquist for the plurality pointed out that the Bruton "rule" was in truth an exception to the

general rule, that rule being that a crucial underpinning of the system of trial by jury is "that juries will follow the instructions given them by the trial judge." 442 US at 73. Where the purposes of the exception are not served, the general rule prevails. Finding the premise of the Bruton exception to be, as stated in Bruton, that the jury cannot be expected to follow a limiting instruction in a case where a nontestifying codefendant has implicated the defendant, with devastating effect, and without cross-examination, the plurality held that the premise does not exist where the defendant himself has also confessed in a manner consistent with the codefendant's confession. In such a case, there is no substantial danger that the jury will disregard a limiting instruction, as it has before it the defendant's own confession.

In sum, the Bruton exception was

created to deal with a factual situation where a nontestifying codefendant had confessed and directly implicated the defendant, the premise of the holding of a confrontation violation being that a jury cannot be expected to follow a limiting instruction in this context. In Lee v Illinois, supra, this Court rejected the state's characterization of "the hearsay involved in this case as a simple 'declaration against penal interest.' That concept defines too large a class for meaningful Confrontation Clause analysis. We decide this case as involving a confession by an accomplice which incriminates a criminal defendant." 106 S Ct at 2064, fn 5. Although Lee involved the direct substantive use of a codefendant's confession (rather than the "indirect" use of Bruton by the presumed failure of a jury to regard a limiting instruction), the point made defines Bruton as well--that case

also involved "a confession by an accomplice which incriminated a criminal defendant."

B. Redaction and "Evidentiary Linkage"

In keeping with the well-established preference for the efficiency of joint trials, see e.g. United States v Cleveland, 590 F 2d 24,29 (1978), alternatives to severance as a remedy to perceived Bruton problems were sought. One such solution, widely employed, is redaction, involving the elimination from the codefendant's confession of at least all direct references to the defendant (or, as in this case, the elimination of any and all indications that another person was at all involved in the offense), and the substitution of a symbol or neutral pronoun; indeed, redaction had been required by some courts prior to Bruton, see 391 US at 134, fn 10 (another solution is the empaneling of joint juries, with the jury

hearing the nonconfessing defendant's case being excused while the confession of the confessing defendant is admitted against him before his jury).

Arguments began to arise that by reference to other admissible evidence presented in the case it was possible for the jury to infer that the individual referred to by use of a symbol or neutral pronoun in the codefendant's confession was in fact the defendant, and even that confessions not referring to another actor were inculpatory of the nonconfessing defendant when taken in conjunction with other evidence. Varying responses to these arguments have been made by the different circuits, distilling essentially to the following three positions:

> 1) <u>The Sixth Circuit position (taken in this case)</u>: to support a confrontation violation the out-of-court statement must, in context, considering all the evidence in the case, clearly implicate the

defendant, and create a substantial risk that the jury looked to the incriminating extrajudicial statement in determining guilt.[3]

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[3] See e.g. the opinion in this case; Hodges v Rose, 570 F.2d 643, 646 (6th Cir.), cert. denied, 436 U.S. 909 (1978); United States v Pickett, 746 F.2d 1129, 1133 (6th Cir. 1984), cert. denied, 105 S. Ct. 1222 (1985); Elliott v Thompson, 599 F.2d 767, 769 (6th Cir.), cert denied, 444 U.S. 932 (1979); United States v Marks, 585 F.2d 164, 168 (6th Cir. 1978); Burkhart v Lane, 574 F.2d 346, 348 (6th Cir. 1978); Poole v Perini, 659 F.2d 730, 733 (6th Cir. 1981), cert. denied, 455 U.S. 910 (1982); Lyle v Koehler, 720 F.2d 426 (6th Cir. 1983) (Petitioner would submit that Lyle is actually a direct reference case; where a codefendant is referred to by an identified nickname, the situation is no different than where he has been referred to by name; Petitioner nonethless submits that Lyle was wrongly decided for the reasons stated in the dissent in that case).

2) The Seventh Circuit position: to support a confrontation violation the out-of-court statement must, in context, considering all the evidence in the case, be powerfully incriminating of the defendant and vitally important to the government's case.[4]

3) The Third Circuit, and majority view: to support a confrontation violation the out-of-court statement must, standing alone, clearly implicate the defendant without reference to other independently admissible evidence.[5]

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[4] See English v United States, 620 F.2d 150, 152 (7th Cir.), cert denied, 449 U.S. 859 (1980); United States v Key, 725 F.2d 1123 (7th Cir. 1984).

[5] See Serio v United States, 401 F.2d 989 (D.C. Cir. 1968); United States v DiGregorio, 605 F.2d 1184, 1190 (1st Cir.), cert. denied, 444 U.S. 937 (1979) ("[W]here the confession does not name a codefendant, it may be admitted ... solely against the confessor, and a limiting instruction does serve to reduce any prejudicial inferences the jury might draw."); United States v Greenleaf, 692 F.2d 182, 189 (1st Cir. 1982), cert. denied, 103 S. Ct. 1522 (1983);

The differences between the Sixth and Seventh Circuit views, while significant, are not striking, the Sixth Circuit rejecting the Seventh Circuit rule that the confession must be vitally important to the government's case, and the Seventh Circuit requiring that the context compel the inculpatory inference rather than simply permit it. Both of these views are diametrically opposed to the Third Circuit view that the confrontation question addressed in Bruton must be

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[5] cont'd. United States v Cleveland, 590 F.2dd 24, 27-28 (1st Cir. 1978); United States v Porter, 764 F.2d 1 (1st Cir. 1985); United States v Wilinson, 754 F.2d 1427, 1435 (2d Cir.), cert. denied. 105 S. Ct. 3482 (1985); United States v Burkee, 700 F.2d 70, 85 (2d Cir.), cert denied, 464 U.S. 8116 (1983); United States v Slocum, 695 F.2d 650, 655 (2d Cir. 1982), cert. denied, 460 U.S. 1015 (1983) ("Where...the inculpatory impact upon the defendant of the statements is defused because it depends upon

reviewed by reference to the redacted confession standing alone.

There are, as noted in the opinion of the Sixth Circuit in this case, a myriad number of cases involving the above-stated positions. Close analysis of two will suffice to set forth the principle justifications for the positions taken.

1) The Third Circuit and Majority View: United States v Belle

The Third Circuit and majority view, that to support a confrontation violation

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5 cont'd. other prosecution evidence to connect the defendant to the subject of the statements, the Bruton rule is not violated."); United States v Marin, 669 F.2d 73, 83 (2d Cir. 1982); United States v Knuckles, 581 F.2d 305, 313 (2d Cir.), cert. denied, 439 U.S. 986 (1978); United States ex rel. LaBelle v Mancusi, 404 F.2d 690 (2d Cir. 1968); United States v Webster, 734 F.2d 1048, 1054 n.6 (5th Cir. 1984), cert. denied. 105 S. Ct. 2340 (1985); United States v

the out-of-court statement must, standing alone, clearly implicate the defendant without reference to other independently admissible evidence, is best expressed in United States v Belle, 593 F 2d 487 (CA 3, 1979), expressing the view of the entire circuit sitting en banc. In that case defendant's codefendant, Munford, made a statement. A DEA agent testified

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5 cont'd. Heffington, 682 F.2d 1075, 1083 (5th Cir. 1982), cert. denied, 459 U.S. 1108 (1983); United States v Castro, 596 F.2d 674, 677 (5th Cir.), cert. denied, 444 U.S. 963 (1979); United States v Stewart, 579 F.2d 356, 359 (5th Cir.), cert. denied. 439 U.S. 936 (1978); United States v Tavelman, 650 F.2d 1133, 1139 (9th Cir. 1981), cert. denied, 455 U.S. 939 (1982); United States v Wright, 742 F.2d 1215, 1223 (9th Cir. 1984); United States v Satterfield, 743 F.2d 827, 849 (11th Cir. 1984), cert. denied, 105 S. Ct. 2362 (1985); United States v Garrett, 727 F.2d 1003, 1013 (11th Cir. 1984), aff'd. 105 S. Ct. 2407 (1985).

to the statement, which revealed that Munford was going to deliver heroin between 8:00 and 8:30 p.m. on a particular date to a particular place. Munford further stated that two or three times in the past he had transported heroin into the same area and on two occasions had met with one O'Neil Roberts. A limiting instruction was given.

On appeal Belle contended that Munford's reference to prior meetings with O'Neil Roberts, to having transported heroin into that area before, and to the location of the delivery on this particular occasion, were inculpatory of Belle. It was argued that inculpatory inferences could be drawn from Munford's statement taken in conjunction with other evidence, primarily that Munford and Belle had been observed in a Lincoln in the parking lot by the place in question; that Belle made a hand signal to another

vehicle, a Cadillac, at which time both vehicles left the lot, one following the other; that the vehicles later stopped and Belle went to the Cadillac and entered it; that Munford was then seen retrieving from under the hood of the Lincoln packages of a sort commonly used for packaging heroin; and that when the Cadillac was then stopped Belle was the passenger and O'Neill Roberts was the driver.

The Third Circuit prefaced its analysis by stating

> In essence, Belle is asserting that whenever a codefendant (here Munford) incriminates himself in a statement which by its express terms does not mention or refer to a joint defendant (here Belle) the Bruton rule will preclude its admission into evidence in a joint trial if there is any other evidence which links the complaining defendant (Belle) to the substance of the statement. We cannot agree as we do not believe that the Supreme Court in Bruton ever intended such a far-reaching result. 593 US at 493.

The court found that the "key" to the

creation of the Bruton exception was that the extrajudicial statement by the nontestifying codefendant was "powerfully incriminating" in that it named the nontestifying codefendant as an accomplice. Where the extrajudicial statement--"and we emphasize, the statement only" (emphasis in original, 593 F 2d at 493)--does not directly implicate the nonconfessing codefendant, the premise for the Bruton exception does not exist. The court went on to note that many courts have consistently approved use of codefendant's confessions after redaction which does not explicitly suggest the participation of the complaining defendant, and that if admission of this sort of redacted statement is permissible, certainly admission of a statement "which makes no reference whatsoever to any other defendant should be admissible as well....In short, evidentiary linkage or

contextual implication may not be utilized to convert a non-Bruton admissible statement into a Bruton inadmissible statement." 593 F 2d at 494.

The court did not rest its analysis there. The court further observed that it could find no evidence in the Bruton opinion that "linkage evidence" was subsumed by its ruling. If such evidence was intended to be subsumed by Bruton, then on a motion for severance the trial court would be required to inspect all prosecution evidence along with the confession, whereas FRCP 14 regarding severance specifically authorizes the trial judge making the severance decision to require the government to deliver for in camera inspection only any confessions or statements by the defendants.

> ...such a result would require the trial judge to examine under a microscope all the prosecution's evidence in order to determine whether any extrajudicial statement made by a nontestifying codefendant

> could be admitted as to that defendant, or whether it would have to be excluded because of the existence of independent 'linkage' evidence which might connect another defendant to the statement. This result would necessarily lead to either a complete 'mini-trial' before the judge, or to the practical prohibition of joint trials....The federal rules do not contemplate such a practice....Bruton itself never suggested such an astonishing result.... 593 F 2d at 496.

2) The Sixth Circuit View: The Instant Case

The Sixth Circuit view is perhaps best represented by the opinion of the panel in the instant case. The panel paid lip service to the principle that there is a strong presumption that jurors can follow the court's instruction, and that the Bruton rule is an exception to the rule--an example of a situation where the presumption is overcome. The panel also acknowledged that "other circuits have generally disapproved of looking beyond the face of the contested extrajudicial statement in determining its incrimina-

tory value, labeling such practice as contextual implication or evidentiary linkage." Petition for Certiorari, 47A. The panel rejected this approach on the ground that it "ignores the true incriminatory effect of the statement....(and) sanction(s) the admission of an extrajudicial statement in circumstances in which a substantial risk exists that the statement will be used against the defendant...." Petition for Certiorari, 50A. The court took particular issue with what it called the "strident" statements of Belle barring evidentiary linkage, stating in response to the analysis in Belle regarding the impracticability of making intelligent pretrial severance rulings if a doctrine of evidentiary linkage is recognized that "We, of course, have little to add to the Supreme Court's rejection of a similar argument in Bruton See...Bruton, 391 US at 135." Petition for Certiorari, 62A.

The panel found evidentiary linkage which resulted in a substantial risk that the jury would be unable to follow the cautionary instructions given in that, though the redacted confession did not even indicate the existence of a criminal participant other than Williams and Martin, Respondent's own testimony placed her in the auto at the time when Williams' confession indicated the robbery and murder plan was discussed. While recognizing that "the value of cross-examining herself, of course, is non-existent," the panel found a confrontation violation because Respondent was unable to challenge what happened in the car on the way to the robbery absent cross-examination of Williams (Respondent had testified that she was in the back seat of the auto and the radio was on, and she could not hear anything said between Williams and Martin). Key to the panel's determination that Respondent's

own testimony, linked with the redacted confession, was "powerfully incriminating" of her were 1)the prosecutor's statement in closing argument "Why did she say she couldn't hear any conversation? She said 'I know they were having conversation but I couldn't hear it because of the radio.' Because if she admits that she heard the conversation and she admits to the plan, she's guilty of at least armed robbery. So she can't tell you that"; 2)that the killings were discussed in the car provided evidence of Respondent's knowledge of a plan encompassing murder, and 3)that malice is a critical element of murder under Michigan law. Petition for Certiorari, 52A. The panel also found that the instant facts were most analogous to United States v Gonzalez, 555 F 2d 308 (CA 2, 1977). There, the codefendant's statement indicated that a particular set of keys belonged to the person who gave him

cocaine. An FBI agent testified that those keys fit Gonzalez' apartment, and the prosecutor argued the inference that the keys were therefore Gonzalez', and Gonzales therefore gave the cocaine to the codefendant.

Concluding, then, that the redacted statement, taken in conjunction with Respondent's testimony, was powerfully incriminating of her, the panel found that there was a substantial risk the jury disregarded the cautionary instructions and considered the statement as substantive evidence against Respondent, in violation of the confrontation clause as construed in Bruton.

C. Analysis and Application

1) Analysis

It is submitted that the Third Circuit/majority view is the correct one, and that the Sixth Circuit, in endorsing a doctrine of contextual implication, particularly under the facts of this

case, failed to pay proper deference to the presumption which is the cornerstone of the system of trial by jury, that the jurors can and will follow instructions given them by the court. It must be remembered that the rule is that jurors can and will follow instructions, and that Bruton is the exception to the rule. The Bruton exception was created and applied in a situation where the codefendant's confession on its face was powerfully incriminatory of the nonconfessing defendant, naming him as a coparticipant in the crime. It was in that specific context that this Court found the presumption that jurors follow instructions overcome.

The presumption, being key to the operation of the jury system, should not be cast aside in a situation falling outside the facts and rationale of Bruton. A part of our system of trial by jury, and of the law of evidence, is the

concept of limited admissibility, recognized even in the Federal Rules of Evidence. See FRE 105. It is understood that on many occasions evidence may be admissible as to one party and not another, or for one purpose and not another, and yet the evidence is admissible at trial, the duty of the trial judge being to "restrict the evidence to its proper scope and instruct the jury accordingly," FRE 105, the duty of the jury being to follow the instruction. This concept, and the presumption that jurors follow limiting instructions, is applied in many difficult situations: the very confession of the defendant may be inadmissible against him to prove the crime charged against him due to a defect in Miranda warnings given him, yet if he testifies inconsistently with the confession, the jury will hear the admission of guilt he made, and be instructed to consider it only on the

issue of his testimonial credibility, and not as proof of his guilt. And the jury is trusted to draw this distinction. Similarly, evidence of other crimes or bad acts may be admitted against the defendant to show a common scheme or plan, and the jury is instructed to consider that evidence for only that purpose, and not as evidence that defendant must be guilty because he is a "bad man," or simply because he had committed other offenses in the past. And the jury is trusted to draw this distinction. It may be that a defendant's testimonial credibility is impeached through evidence of prior convictions, and the jury is instructed to consider only the impact of the convictions on his credibility, and not to use them as evidence of guilt. Again the jury is trusted to draw this distinction. The presumption that jurors follow instructions should not be

overcome, then, when the confession of a codefendant is admitted under a limiting instruction that it may not be considered as evidence against the defendant, where that confession does not, on its face, directly and powerfully incriminate the defendant. Petitioner submits that a rule which readily casts aside the presumption that jurors can and do follow the law is representative of an elitist view of the law, and runs counter to the deservedly exalted position the principle of trial by jury is given in our system of justice.

Moreover, Petitioner would submit that the practical concerns advanced by the Third Circuit in Belle regarding the impossibility of intelligent severance decisions under a doctrine of contextual implication have great force. Bruton did not envision a trial before the trial to determine if, from all the prosecution evidence, and from evidence from the

defense, including the proposed testimony of the defendant him or herself, it is possible for the jury to draw an inculpatory inference from the codefendant's confession when it is juxtaposed with other evidence in the case. The Sixth Circuit's rejoinder to this argument, "We, of course, have little to add to the Supreme Court's rejection of a similar argument in Bruton See...Bruton, 391 US at 135," simply will not do. In the cited reference to Bruton this Court rejected an argument that the benefits of joint proceedings "should not have to be sacrificed by requiring separate trials in order to use the confession against the declarant," 391 US at 134, finding that the advantage of joint trials could be overcome by principles of confrontation, but only in those "contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital

to the defendant, that the practical and human limitations of the jury system cannot be ignored." 391 US at 135-136.

The majority also stated that an argument that the Bruton rule would mean that the prosecution would be "denied the benefit of the confession to prove the confessor's guilt," 391 US at 133, was fallacious, noting that "it overlooks alternative ways of achieving that benefit without at the same time infringing the nonconfessor's right of confrontation," pointing to the alternative of redaction! 391 US at 133-134. The doctrine of contextual implication would mean that there is no practical alternative to severance, and that where there is a joint trial and one defendant has confessed, severance must be granted, for the practical concerns advanced by Belle are persuasive, particularly in the context of this case. If the testimony of the nonconfessing defendant can ever

be considered as the linking evidence to the codefendant's confession, so as to overcome the presumption that the jury will follow limiting instructions, then there can be no such thing as redaction, for in advance of trial the defendant's testimony will not be known, nor, in cases where the linking evidence may or may not exist in other proofs, will the trial judge have access to all the evidence.

Petitioner submits, then, that the necessary and weighty presumption that jurors can and will follow limiting instructions prevails unless overcome, and that in the context of the admission of a nontestifying codefendant's confession at a joint trial the presumption prevails unless the confession on its face is directly and powerfully incriminatory of the nonconfessing defendant. Any other rule would mean that a joint trial may not be had in any case where a

defendant has confessed, unless the prosecution foregoes use of the confession.

2)Application

If this Court accepts the view of the Third Circuit, which is the view of the majority of circuits, then plainly severance was properly denied in this case, as on its face the redacted confession does not even indicate that any individual other than Kareem Martin was involved in any way in the crime here. Moreover, even if a doctrine of contextual implication or evidentiary linkage is recognized, it should not cause reversal of Respondent's conviction.

As indicated previously, the Sixth Circuit in this case found three points "especially pertinent" to its decision: "1)that the prosecution in closing argument pointed out the impermissible linkage to the jury, 2)that the killings

were discussed in the car provided evidence of Marsh's knowledge of a plan encompassing murder, and 3)that intent or malice is a critical element of both offenses under Michigan law." None of these considerations, individually or collectively, is persuasive.

First, the court found that the prosecutor "pointed out the impermissible linkage to the jury" with the following remark: "Why did she say she couldn't hear any conversation? She said 'I know they were having conversation but I couldn't hear it because of the radio.' Because if she admits that she heard the conversation and she admits to the plan, she's guilty of at least armed robbery. So she can't tell you that." But Respondent <u>had</u> herself testified that she was in the auto when the conversation occurred, and the prosecutor's brief comment on it was apt. Moreover, the prosecutor did <u>not</u> argue that Respondent

was involved in the plan because of the discussion in the auto. The Sixth Circuit quotation of the remark takes it out of its context. Directly after the quoted remark, the prosecutor continued "How else do you know that she planned the robbery and was guilty of First Degree Felony Murder as well as the robbery?" (JA 327). There continued a lengthy analysis of Respondent's conduct during the events (which the prosecutor had started before the remark quoted by the Sixth Circuit), which the prosecutor argued demonstrated her guilt and involvement, including: her conduct after Kareem Martin pulled a gun demonstrated no surprise and indeed advance knowledge the event would occur; Respondent's actions in going to the door indicated she was to be a lookout, was to prevent escape, and was to let Williams into the house; that her conduct indicated she knew Williams would be coming to the

door, and she admitted him without question, after Martin had pulled his gun; perhaps most importantly, that when Cynthia Knighton tried to escape with her son, Respondent grabbed her and held her and prevented the escape; that a bag of stolen items was handed to Respondent by Martin and Williams after they came down stairs; and that both Martin and Williams, after having pulled weapons and started the robbery, went upstairs with Ollie Scott to search for money, leaving Respondent downstairs alone with Cynthia Knighton and her son (JA 327-335). As the prosecutor stated, Respondent's participation in the entire scheme was demonstrated by the fact that Williams and Martin "had enough confidence to leave her alone downstairs with Cynthia Knighton" (JA 334). The argument regarding Respondent's involvement and the inferences as to advanced planning

were scarcely based, then, on Williams' confession.

Petitioner would also point out that this case involves a habeas corpus proceeding. There was no objection to the remark quoted by the Sixth Circuit at trial, nor was it raised in the Michigan Courts. It should not be considered now.

As to the statement by the Sixth Circuit "that the killings were discussed in the car provided evidence of Marsh's knowledge of a plan encompassing murder," it must be remembered that Marsh herself placed herself in the car when the discussion took place--absent her own testimony, there would have been no such evidence. Petitioner has argued above that if the defendant's own testimony may serve as linking evidence, then there is no such thing as redaction.

Finally, with regard to the Sixth Circuit's observation that "intent or malice is a critical element of both

offenses under Michigan law," the statement is true in so far as it goes, but it does not mean that a premeditated homicide is required for felony-murder in Michigan. What is required is malice; that is, that the defendant either intended to kill, intended to do great bodily harm, or acted with wanton and wilful disregard of the likelihood that death or great bodily harm would result (and that the homicide occurred during the course of a statutorily enumerated felony). See People v Aaron, 409 Mich 672, 733 (1980). The manner in which the felony was committed may allow an inference of wanton and wilful disregard, particularly where a weapon is employed. See People v Woods #2, 124 Mich App 645 (1983); Aaron at 729-730. In short, that malice is required for felony-murder has no special relationship to the fact that Williams' confession also demonstrates that the crime was not only a felony-

murder, but a premeditated murder as well.

Petitioner would submit, then, that absent a doctrine of contextual implication or evidentiary linkage no Bruton problem exists in this case, and that even under a doctrine of contextual implication it should not be said in this case that the confession was "powerfully incriminating" of Respondent, so as to overcome the presumption that the jury followed the limiting instructions. There simply is no reason why a mistrust of the jury should exist in this situation.

II. THE CODEFENDANT'S CONFESSION IN THIS CASE WAS ADMISSIBLE AGAINST RESPONDENT AS A DECLARATION AGAINST PENAL INTEREST

If this Court determines that under the facts of this case the presumption that the jury could follow the limiting instructions regarding the evidentiary use of the codefendant's confession has

been overcome, the inquiry has only begun, for if this case is to be treated as one where the codefendant's statement was considered substantively against Respondent, there remains the question of whether substantive use of the statement would deny Respondent's confrontation rights. Petitioner submits that it would not.

It must be remembered that this Court in Bruton was careful to note that "the hearsay statement inculpating petitioner was clearly inadmissible against him under traditional rules of evidence....we intimate no view whatever that such exceptions necessarily raise questions under the Confrontation Clause...." 391 US at 128, fn 3. At the time Bruton was decided the Federal Rules of Evidence were not yet in place, and, despite the strenuous objections of evidence scholars and commentators, see e.g. McCormick, Evidence (2d Edition), p.673-675, the

declarations against interest hearsay exception was generally held to apply only to declarations against pecuniary interest. With the acceptance of declarations against penal interest as a hearsay exception, the contours of Bruton require reexamination.

A. The Jurisprudence of Confrontation

The argument that the confrontation clause is absolute, and that thus no hearsay can ever be admitted into evidence, has never been accepted. It has also been argued that the confrontation clause constitutionalized the hearsay rule as it existed at the time of the adoption of the Sixth Amendment. This view is equally untenable. The law of evidence is still subject to thoughtful alteration.

In Pointer v Texas, 380 US 400; 13 L Ed 2d 923; 85 S Ct 1065 (1965) it was held that the introduction at trial of an unavailable witness's examination testi-

mony was constitutionally impermissible where defendant had no counsel at the examination and no opportunity to cross-examine the witness. Speaking for the Court Justice Black noted:

> It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him. 13 L Ed 2d at 926.

This sweeping language must, however, be viewed as dicta, and as dicta impliedly rejected by later cases, for if taken as written it would outlaw the use of hearsay statements, including those within the recognized exceptions.

That confrontation cannot so readily be equated with cross-examination; indeed that confrontation cannot be viewed as cross-examination with the exception of those hearsay exceptions recognized at the time of the adoption of the Sixth Amendment, is apparent from California v

Green, 399 US 149; 26 L Ed 2d 489; 90 S Ct 1930 (1970). Involved was a California statute which allowed the prior inconsistent statements of a witness testifying at trial to be admitted as substantive evidence. The Court noted that the generally recognized purpose of the confrontation clause is to prevent trial by ex parte affidavit. Justice White, speaking for the majority, went on to discuss the relationship between the confrontation clause and hearsay rules:

> While it may readily be conceded that the hearsay rules and the confrontation clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the confrontation clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law....merely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied. 26 L Ed 2d at 495.

Justice White further remarked that even

had the witness not been present at trial, his prior statement, in the form of examination testimony, could have been admitted as substantive evidence without constitutional difficulty, because at his examination his counsel was not "significantly limited in any way in the scope or nature of his cross-examination of the witness...." 26 L Ed 2d at 501.

In a thoughtful concurrence Justice Harlan observed that the decision of the California Supreme Court was the result of decisions of the United States Supreme Court which "indiscriminately equated 'confrontation' with cross-examination'":

> If 'confrontation' is to be equated with the right to cross-examine, it would transplant the ganglia of hearsay rules and their exceptions into the body of constitutional protections. The stultifying effect of such a course upon this aspect of the law of evidence in both state and federal systems need hardly be labored, and it is good that the Court today, as I read its opinion, firmly eschews that course. 26 L Ed 2d at 505.

Justice Harlan went on to call for a

"fresh look" at the constitutional conception of confrontation.

In Dutton v Evans, 400 US 74; 27 L Ed 2d 213; 91 S Ct 210 (1970) the Court once again wrestled with the relationship between the confrontation clause and cross-examination. A Georgia statute, which allowed admission as substantive evidence statements of a coconspirator during the "concealment phase" of the conspiracy, was attacked on confrontation grounds. Justice Stewart, writing for a four justice plurality, with Justice Harlan concurring, stated that:

> The decisions of this court make it clear that the mission of the confrontation clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact (has) a satisfactory basis for evaluating the truth of the prior statement.' (27 L Ed 2d at 227, citing California v Green, emphasis added).

The Court held that:

> From the viewpoint of the Confrontation Clause, a witness under

> oath, subject to cross-examination, and whose demeanor can be observed by the trier of fact, is a reliable informant not only as to what he has seen but what he has heard. 27 L Ed 2d at 226.

Justice Harlan, in his concurring opinion, continued his "fresh look" at confrontation, reaching the conclusion that the position espoused by Wigmore is the correct view:

> The Constitution does not prescribe what kinds of testimonial statements (dying declarations or the like) shall be given infra-judicially, - this depends on the law of Evidence for the time being - but only what mode of procedure shall be followed i.e. a cross-examining procedure - in the case of such testimony as is required by the ordinary law of evidence to be given infra-judicially (emphasis added). 5 Wigmore, 1397, p. 131.

Justice Harlan, then, reached the position that questions of hearsay exceptions and the absence of cross-examination are not Confrontation Clause problems at all, but due process problems. 27 L Ed 2d at 231.

Another case indicating that the

mission of the confrontation clause is not solely cross-examination is Mancusi v Stubbs, 408 US 204; 33 L Ed 2d 293; 92 S Ct 2308 (1972). The case dealt with the use of prior recorded testimony, and the Court stated:

> The focus of the Court's concern has been to insure that there 'are indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant and to 'afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement.' (citations omitted).

The Court found the cross-examination adequate so as to give the testimony "sufficient indicia of reliability" and afford "the trier of fact a satisfactory basis for evaluating the truth of the prior statement." 33 L Ed 2d at 303.

A more recent case in the area is Ohio v Roberts, 448 US 56; 65 L Ed 2d 597; 100 S Ct 2531 (1980), another prior recorded testimony case. The Court observed that

the Confrontation Clause reflects a "preference" for face-to-face confrontation at trial, and that a primary interest it secures is that of cross-examination. However, this preference may be overcome, principally upon a showing of sufficient indicia of reliability.

In United States v Inadi, US ; 106 S Ct 1121 (1986) this Court considered the constitutionality of FRE 801(d)(2)(E), the coconspirator's declarations hearsay exception, in that the Rule does not require unavailability. Holding that "Roberts cannot fairly be read to stand for the radical proposition that no out-of-court-statement can be introduced by the government without a showing that the declarant is unavailable," 106 S Ct at 1126, the Court upheld the Rule (See also New Mexico v Earnest, US ; 39 Cr L 3252 (1986), Justice Rehnquist concurring for four members of the Court with

the remand for further proceedings not inconsistent with Lee v Illinois, infra, observing that under this Court's recent cases "a lack of cross-examination is not necessarily fatal to the admissibility of evidence under the Confrontation Clause....the State is entitled to an opportunity to overcome the weighty presumption of unreliability attaching to codefendant statements by demonstrating that the particular statement at issue bears sufficient 'indicia of reliability' to satisfy Confrontation Clause concerns").

B. Lee v Illinois

Central to an analysis of the confrontation implications of substantive admission of the codefendant's confession as against Respondent in this case is the recent decision in Lee v Illinois, US ; 106 S Ct 2056 (1986). In Lee the trial judge, at a bench trial, expressly relied upon portions of the codefendant's

confession in finding defendant Lee guilty of murder. The codefendant, Thomas, had implicated both himself and defendant in the crimes, and the only apparent theory of admissibility of his statement against defendant was the declarations against penal interest exception. Justice Brennan for a five member majority declined to accept the state's characterization of "the hearsay involved in this case as a simple 'declaration against penal interest.' That concept defines too large a class for meaningful Confrontation Clause analysis. We decide this case as involving a confession by an accomplice which incriminates a criminal defendant." 106 S Ct at 2064, fn 5. In other words, Lee involved a declaration against penal interest, but a particular kind or sort of declaration against penal interest; namely one which declares not only that the declarant is guilty of criminal

conduct but that another party is also. Under these circumstances, the majority found that the State's "grounds for holding Thomas' statement to be reliable with respect to Lee's culpability" did not meet the Confrontation Clause standard of demonstrating substantial indicia of reliability.

This Court found reliability lacking primarily due to its conclusion that there was a clear divergence between the confession of the codefendant and that of the defendant as to the participation of the parties in the murders--"The discrepancies between the two go to the very issues at trial: the roles played by the two defendants in the killing of Odessa, and the question of premeditation in the killing of Aunt Beedie." 106 S Ct at 2065. Because, then, of these conflicts, and the well-recognized motivation to shift blame or curry favor, the majority was "not convinced that there exist

sufficient 'indicia of reliability,' flowing from either the circumstances surrounding the confession or the 'interlocking' character of the confessions, to overcome the weighty presumption against the admission of such uncross-examined evidence." 106 S Ct at 2065.

Justice Blackmun, for a four member dissent, observed that in Bruton the inadmissibility of the codefendant's statements as against the defendant was not contested, and that Bruton therefore only applies to "situations in which the out-of-court statements are constitutionally inadmissible against the defendant," and disagreed with the majority conclusions as to reliability, stating that in the case before the Court "there is little reason to fear that Thomas' statements to the police may have been motivated by a desire to shift blame to petitioner." 106 S Ct at 2068. Justice

Blackmun concluded that "in this case the practical unavailability of petitioner's codefendant as a witness for the State, together with the unusually strong and convincing indications that his statements to the police were reliable, rendered the confession constitutionally admissible against petitioner." 106 S Ct at 2071.

C. The Instant Case

The codefendant's statement, in its original (with the portions subsequently redacted in boldface), read as follows:

> On Sunday evening, October the 29th, 1978, at about 6:30 p.m., I was over to my girl friend's house at 237 Moss, Highland Park, when I received a phone call from a friend of mine named Kareem Martin. he said he had been looking for me and James Coleman, who I call Tom. He asked me if I wanted to go on a robbery with him. I said okay. Then he said he'd be by and pick me up. About 15 or 20 minutes later Kareem and Clarissa, who I call "KC", who is Kareem's girl friend, came by in his black Monte Carlo car. I got in the car and Kareem and Clarissa told me he was going to stick up this crib where the

lady knew them. Clarissa said told me the place was a numbers house where she used to work and the lady knew her so there would be no trouble getting in because she owed her a hundred dollars and she would let them in. Kareem said there would be over $5,000 or $10,000 in the place. Kareem said that the (sic) would have to take them out after the robbery because they knew them. Kareem had a big silver gun. He gave me a long barrelled .22 revolver. We then drove over to this house and parked the car across the big street near the house. The plan was that I was supposed to wait outside until they got inside and then KC (Clarissa) was supposed to come out on the porch and let me know that Kareem had stuck the place up. Wait a minute, The plan was that I would wait in the car in front of the house until KC signaled me and the (sic) I would move the car down across the big street because they he didn't want anybody to see the car. Okay, Kareem and KC went up to the house and went inside. A couple of minutes later KC came out on the porch and waived. I moved the car and went up to the house. I knocked on the door and KC opened the door. As I entered, Kareem and this older lady were in the dining-room, a little boy and another younger woman were sitting on the couch in the front room. I pulled my pistol and told the younger woman and the little boy to lay on the floor. Kareem took the older lady upstairs. He had a pistol, also. I stayed downstairs with the two people on the floor and KC.

After Kareem took the lady upstairs I went upstairs and the lady was laying on the bed in the room to the left as you get up the stairs. The lady had already given us two bags full of money before we even got upstairs. Kareem had thought she had more money and that's why we had went upstairs. Me and Kareem started searching the rooms but I didn't find any money. **Before Kareem took the lady upstairs, the lady was asking Clarissa, 'why are you doing this to me?' Clarissa didn't answer as** I recall. I came downstairs and then Kareem came down with the lady. I said, "Let's go, let's go." Kareem said no. Kareem then took the two ladies and little boy down the basement and that's when I left to go to the car. I went to the car and got in the back seat. **A couple of minutes later KC came to the car. She got behind the wheel and drove the car around the corner from the house and parked on the big street.** A couple of minutes later, Kareem came to the car and said he thinks that the girl was still living because she was still moving and he didn't have any more bullets. He asked me how come I didn't go down the basement and I said I wasn't doing no shit like that. He then dropped me back off at my girl's house in Highland Park and I was supposed to get together with him today, get my share of the robbery after he had counted the money. That's all. (JA 102-106)

Deleting the boldface redacted portions of the statement, then, the

statement as admitted read as follows:

> On Sunday evening, October the 29th, 1978, at about 6:30 p.m., I was over to my girl friend's house at 237 Moss, Highland Park, when I received a phone call from a friend of mine named Kareem Martin. he said he had been looking for me and James Coleman, who I call Tom. He asked me if I wanted to go on a robbery with him. I said okay. Then he said he'd be by and pick me up. About 15 or 20 minutes later Kareem came by in his black Monte Carlo car. I got in the car and Kareem told me he was going to stick up this crib, told me the place was a numbers house. Kareem said there would be over $5,000 or $10,000 in the place. Kareem said he would have to take them out after the robbery. Kareem had a big silver gun. He gave me a long barrelled .22 revolver. We then drove over to this house and parked the car across the big street near the house. The plan was that I would wait in the car in front of the house and then I would move the car down across the big street because he didn't want anybody to see the car. Okay, Kareem went up to the house and went inside. A couple of minutes later I moved the car and went up to the house. As I entered, Kareem and this older lady were in the diningroom, a little boy and another younger woman were sitting on the couch in the front room. I pulled my pistol and told the younger woman and the little boy to lay on the floor. Kareem took the older lady upstairs. He

> had a pistol, also. I stayed downstairs with the two people on the floor. After Kareem took the lady upstairs I went upstairs and the lady was laying on the bed in the room to the left as you get up the stairs. The lady had already given us two bags full of money before we even got upstairs. Kareem had thought she had more money and that's why we had went upstairs. Me and Kareem started searching the rooms but I didn't find any money. I came downstairs and then Kareem came down with the lady. I said, "Let's go, let's go." Kareem said no. Kareem then took the two ladies and little boy down the basement and that's when I left to go to the car. I went to the car and got in the back seat. A couple minutes later Kareem came to the car and said he thinks that the girl was still living because she was still moving and he didn't have any more bullets. He asked me how come I didn't go down the basement and I said I wasn't doing no shit like that. He then dropped me back off at my girl's house in Highland Park and I was supposed to get together with him today, get my share of the robbery after he had counted the money. That's all.

Petitioner submits as redacted, and even as unredacted, the confession was admissible against Respondent as substantive evidence without violation of Confrontation Clause principles.

First, was the confession, in its original form, as given to the police, against Williams' penal interest? It was devastating to his defense. He admitted that he was called by Kareem Martin for the express purpose of assisting in an armed robbery; that after he was picked up by Martin and Respondent the place of the robbery was discussed, as well as the plan of entry, and the items to be stolen; that Martin stated that the occupants of the house would have to be killed as a part of the robbery; and that Martin gave him a gun and possessed a gun himself. He also confessed to going into the house as planned and assisting in the robbery, stating that Kareem Martin did the killings (a fact corroborated by the surviving victim, and to be discussed subsequently). There is no question but that by his confession Williams admitted being a participant in an armed robbery which had, as a preconceived design, the

execution of the victims of the robbery. The statement is highly reliable.

What of the principal concern of the majority in Lee; namely, the motivation to shift blame? There was no attempt to shift blame to Respondent. Williams detailed her participation--her presence in the auto, her involvement in the discussion of the plan for the robbery including that the method of entry was keyed on the fact that one occupant, Ollie Scott, knew Respondent; and her admission of Williams into the house after Martin and Respondent had already entered. None of this description of Respondent's involvement in the events in any way shifted Williams' responsibility or diminished it one whit. The only possible "blame shifting" in the statement appears where Williams states that the killings were carried out by Martin. But this claim is consistent with the testimony of the surviving

victim, Cynthia Knighton. The only discrepancy is that Williams' confession attempts to mitigate his moral culpability to a degree by stating that he was not present when the murders were carried out, whereas Cynthia Knighton testified that he was. But this mild attempt to place himself in a better light in no way mitigated Williams' responsibility--he assisted in the crime knowing murder and robbery were the objects of the enterprise, and he did not indicate any abandonment on his part; he waited in the vehicle, and was supposed to "split the take" with Martin the next day. Any presumption of unreliability should be viewed as overcome on these facts.

But there is even more evidence demonstrating the reliability of the confession (as unredacted); namely, the testimony of Cynthia Knighton. Ms. Knighton's testimony corroborates

Williams' confession in many details: she testified that Martin and Respondent entered the house before Williams; she testified that Williams was admitted by Respondent after the robbery had begun; she testified that Martin initially went upstairs with Ollie Scott to search for money, and that Williams went upstairs subsequently; she testified that Williams had a handgun which was "black and long" and that Martin had a "short, fat, shiny, handgun" (the confession states that "Kareem had a big silver gun. He gave me a long barrelled .22 revolver"); and she testified that Martin did the shootings.

It is submitted, then, that the difficulties perceived by the majority in Lee as to the substantive use of the statement of the codefendant there do not exist in this case, even with the unredacted statement. For constitutional purposes, the unredacted confession, if considered by the jury as substantive

evidence against Respondent, was properly so considered. Certainly, then, the redacted confession, which only details the involvement of Martin and Williams, cannot be viewed as violating principles of confrontation.

In sum, the confession, both as redacted and as unredacted, contains, under the circumstances, substantial indicia of reliability, so as to overcome the presumption of inadmissibility against Respondent. Even if a doctrine of contextual implication under Bruton is recognized and applied to this case so as to overcome the presumption that a jury will follow the instructions given it, no rights of the Respondent were violated.

CONCLUSION

Wherefore, Petitioner respectfully requests that the Sixth Circuit Court of Appeals be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

GLORIA RICHARDSON, Warden,
Petitioner,

v.

CLARISSA MARSH,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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BRIEF FOR RESPONDENT

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COUNTER-STATEMENT OF QUESTION PRESENTED

Whether Respondent was denied her Sixth Amendment right of confrontation where a codefendant's extrajudicial statement, even as redacted, added substantial, perhaps critical weight to the prosecutor's case both standing alone and when viewed in the context of other evidence, including the Respondent's own exculpatory testimony, and where respondent was unable to cross-examine her codefendant.

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COUNTER-STATEMENT OF THE CASE

Respondent Clarissa Marsh was convicted by a jury in the Recorder's Court for the City of Detroit of two counts of felony murder, M.C.L. 750.316; M.S.A. 28.548 and one count of assault with intent to commit murder, M.C.L. 750.83; M.S.A. 28.278. She was sentenced to mandatory life imprisonment on the two murder counts and 60 to 90 years on the assault conviction.

Respondent was tried jointly with Benjamin Williams. Prior to trial, the Judge denied her motion for severance (R. 20).

The charges arose out of an incident on October 29, 1978 at the home of Ollie Scott, which culminated in the shooting deaths of Ms. Scott and Koran Knighton and serious injury to Cynthia Knighton, Koran's mother.

The chief witness for the prosecution was Cynthia Knighton. She testified that on October 29, 1978, she was at the home of her aunt, Ollie Scott, with her young son Koran (J.A. 25-26). She stated that she had taken Koran to the bathroom upstairs, and when she came back down, she saw a man and a woman talking to her aunt. She identified the Respondent as the woman (J.A. 28-30). According to Ms. Knighton, Respondent stated she had come to "pick something up" (J.A. 33).

Knighton testified that after a period of conversation, the man pulled a gun and stated that Ollie Scott knew something about someone who had gotten killed (J.A. 34-35).

According to Knighton, Respondent stood up and walked to the front door (J.A. 37). She did not have a weapon or anything else in her hands (R. 216).

Eventually the doorbell rang, and the man with the gun asked Scott who was at the door. The Respondent opened

the door, and a man who Knighton identified as Benjamin Williams entered holding a gun. Ms. Knighton recalled Williams saying, "I'm so-and-so's brother," and "Where's the money?" (J.A. 40-43).

The first man (who had first been in the house with Respondent) then took Ollie Scott upstairs. Respondent was still by the front door at this time, and Williams went into the next room (J.A. 46-47). At that point Ms. Knighton ran towards the front door with her son (T 169). Knighton stated that Respondent "grabbed" her, and Williams came in from the next room. Respondent did not shout out or say anything during this incident, but Williams told Knighton to lay down on the floor (J.A. 47-48).

Williams then went upstairs, and Knighton testified that she heard what she believed were drawers opening and closing (J.A. 53).

When Scott, Williams, and the other man came back downstairs, the other man handed a grocery bag to Respondent (J.A. 54).

At that point both men still had guns (J.A. 56). The first man took Ollie Scott into the basement (J.A. 57). Respondent was still by the front door at this time (J.A. 58). Williams then told Ms. Knighton and her son to go into the basement (J.A. 59). Knighton testified that once she left the living room, she never saw the Respondent again, and she did not know whether Respondent was even in the house when everyone else went into the basement (R. 229-230).

Knighton testified that when she entered the basement, Ollie Scott was lying on the floor, and the other man was unrolling a blanket (J.A. 61-62). Williams said, "Hurry up and tie them up," and the other man replied,

"We'll have to hurt them" (J.A. 65-66). Ms. Knighton stated that she then heard two shots coming from the small room in the basement where her aunt and the other man were (J.A. 70). Then, the other man approached her, held a blanket in front of her, and shot her three times (J.A. 72-74). After she was shot, Ms. Knighton heard what she described as "two little pings" (J.A. 76).

Knighton testified that after a few minutes she opened her eyes and saw that the men were gone (J.A. 77). She also saw her aunt and her son laying on the basement floor. She went upstairs and called the police (J.A. 78-79).

Clarissa Marsh's jointly tried co-defendant, Benjamin William, was alleged to have made a statement to the police after his arrest. Williams challenged the admission of the statement, but following a hearing, the judge ruled that he made the statement voluntarily (R. 149-150).

Respondent Marsh objected to the statement under *Bruton* v. *United States*, 391 U.S. 123; 20 L.Ed.2d 476; 88 S.Ct. 1620 (1968), contending that although it incriminated her, she would be unable to cross-examine Williams (J.A. 90-92). Respondent also renewed her motion for severance (J.A. 100-101).

The trial judge denied the motion for severance and ruled that Williams' statement could be admitted with deletions of Respondent Marsh's name (J.A. 107). Although the deletions were agreed upon by the prosecutor and defense counsel, both the judge and defense counsel made it clear that for purposes of appeal, Respondent's objection to the admission of any portion of the statement remained (J.A. 100; 107-108).

Detroit Police Officer Daniel McCarty read the edited version of Williams' statement to the jury. According to that statement, Williams received a telephone call from

Kareem Martin on the evening of October 29, 1978. Martin asked if he wanted to "go on a robbery" with him. About 15 to 20 minutes later, Martin picked him up in a black Monte Carlo car. Martin told him that they were going to rob a numbers house, and they would have to "take them out" after the robbery. Martin had a big silver gun, and he gave Williams a long-barrelled .22 revolver. According to the statement, they planned out the details of the robbery. Williams allegedly stated that after they got the money, Martin took the two ladies and the boy into the basement and he (Williams) went out to the car. After a few minutes, the statement said, Martin came to the car and remarked that he thought the girl was still alive, but he didn't have any more bullets. He allegedly asked Williams why he didn't go into the basement, and Williams replied that he "wasn't doing no shit like that." Martin then dropped Williams off in Highland Park (J.A. 119-123).

The trial judge instructed the jury that the statement could not be used as evidence against Respondent Marsh (J.A. 126-127). Williams did not take the stand.

Respondent testified in her own behalf. She stated that she was divorced and had two sons, aged 5 and 7, who were living in Ohio with her mother (J.A. 142-143). She met Kareem Martin in November of 1977, and by December they were "going together." She testified that in May or June of 1978 she was surprised to learn that Martin had a drug problem (J.A. 144-146).

Respondent stated that from that point on, Martin became overbearing with her (J.A. 151). Where he had previously shown interest in her children, he now became stricter (J.A. 152). She asked him to leave a number of times, but he stayed around (J.A. 153-154). He wouldn't

let her use her own car, a black Monte Carlo, and he physically abused her (J.A. 154-155). On numerous occasions, Martin forced her to borrow money from her friends and family in order to support his drug habit. (J.A. 148-149; 157-159).

Respondent testified that she became very depresserd with her situation, and on June 18, 1978, she was hospitalized following an attempted suicide (J.A. 156). She stated that in October of 1978, she attempted suicide again by taking 40 or 50 valium pills (J.A. 162-163).

Respondent testified that on October 29, 1978, she went to the Eastland Shopping Center with Martin and her children (J.A. 163-164). While she was there, she lost her wallet, which contained money with which Martin had planned to purchase drugs (J.A. 164). Martin became very upset and told her to borrow more money (J.A. 165, 168). When she was unsuccessful in borrowing money, Martin told her to try to get the money from Ollie Scott (J.A. 168-169). Respondent had worked with Scott, and had borrowed about $100 from her previously in the summer of 1978 (J.A. 161). Martin insisted on accompanying her to Scott's house (J.A. 169).

After dropping her children off at a Halloween party, Respondent and Martin picked up a friend of Martin (J.A. 170). She later identified this friend as Benjamin Williams (J.A. 272). Respondent stated that during the drive to Scott's house, she heard no conversation about a robbery (J.A. 170-171), and she didn't know that Martin or anyone else was armed (J.A. 196).

Respondent testified that she and Martin entered Ollie Scott's house, and she asked Scott about borrowing some money (J.A. 171-172). She stated that after a period of conversation, Martin pulled a gun (J.A. 175). Respondent

got up and walked to the door, but testified that she did not feel free to leave at that time (J.A. 176-177). She heard the doorbell and saw that it was Martin's friend whom they had picked up (J.A. 177).

Respondent testified that she didn't try to leave the house because she was afraid. She stated that she did not leave the area by the front door (J.A. 178-179).

Respondent stated that Martin took Ollie Scott upstairs, and Williams followed, but that they came right back down (J.A. 178). At one point Cynthia Knighton jumped up and ran for the door where Respondent was standing. Respondent testified that she was startled and put her hands out (J.A. 180-182). She stated that she may have grabbed Ms. Knighton (J.A. 182). In any event, Williams came in from the next room and told Ms. Knighton and her son to sit on the floor (J.A. 183).

Respondent testified that when Martin came back downstairs, he handed her a bag, which she placed on the floor (J.A. 185). Then, Martin took Ollie Scott toward the basement, and Williams told Ms. Knighton and her son to go to the basement (J.A. 186-187). Respondent stated that she never heard anyone say anything about being hurt, shot, or killed (J.A. 186).

After everyone else went to the basement, Respondent grabbed her purse and left the house (J.A. 187). She stated that she picked up her children and drove around for a long time (J.A. 188). She then telephoned her brother, who met her at a motel and registered her in a room (J.A. 190). Her children went with her brother (J.A. 191). The next morning Respondent heard on the news that a murder had occurred at Ollie Scott's house (J.A. 192).

Respondent stated that she called Martin's sister, who arranged a meeting with Jonathan Walker, trial counsel in this case. That evening, accompanied by Mr. Walker, she voluntarily turned herself in to the police (J.A. 192-195).

Respondent testified that she had no intention of robbing or killing anyone when she went to Ollie Scott's house (J.A. 196).

The prosecutor's theory of the case was that both Respondent and Williams aided and abetted Martin in the perpetration of robbery and murder (J.A. 303-304; 319-320). In regard to Williams, he told the jury that the statement made to the police showed the intent to commit a robbery (J.A. 309-310). The prosecutor also told the jury that Williams "knew before he even got over to the home on Mendota that there was going to be a killing. Kareem said that he would have to take them out after the robbery" (J.A. 311-312). Also, the prosecutor stated that Respondent Marsh was in on the planning stages of the robbery (J.A. 339).

Respondent's theory was that the prosecutor did not show her guilt beyond a reasonable doubt and that her very presence on the night in question was a product of duress (J.A. 355-356; 417-418).

SUMMARY OF ARGUMENT

In the context of a joint trial, a defendant is denied the Sixth Amendment right of confrontation when he or she is incriminated by the extrajudicial admission of a nontestifying codefendant. Under these circumstances, *Bruton* v. *United States*, 391 U.S. 123; 20 L.Ed.2d 476; 88 S.Ct. 1620 (1968), holds that cautionary instructions to the jury are inadequate to protect the defendant's rights under the Confrontation Clause, because of the elevated

risk that the jury will erroneously use the hearsay against the defendant and the great harm to the defendant if it does.

Given that the overriding concern of the Confrontation Clause is to ensure the reliability of the truth-finding process, *Bruton* is not limited to cases where the accomplice's statement only names or incriminates a defendant on its face. If an otherwise innocuous statement becomes strongly inculpatory when viewed in the context of other, admissible evidence, then there is an equal risk that the jury will misuse the statement against the defendant despite instructions to the contrary, especially in cases woven from circumstantial evidence.

The correct analysis of a *Bruton* problem looks at the strength of inculpatory inference engendered by the codefendant's statement, not whether its source was direct or circumstantial. If the challenged evidence, either on its face or in the context of other evidence, adds substantial weight to the prosecutor's case in a form not subject to cross-examination, and if there are no other factors which would rebut the strong presumption of unreliability which inheres in an accomplice's confession, then *Bruton* has been violated. The only remaining question becomes whether the error is harmless beyond a reasonable doubt.

An approach which does not look beyond the four corners of the accomplice's statement will, in a case such as the one before this Court, ignore the true incriminatory nature of the evidence and pose a serious threat to the reliability of the verdict.

ARGUMENT

I. RESPONDENT WAS DENIED HER SIXTH AMENDMENT RIGHT OF CONFRONTATION WHERE A CODEFENDANT'S EXTRAJUDICIAL STATEMENT, EVEN AS REDACTED, ADDED SUBSTANTIAL, PERHAPS CRITICAL WEIGHT TO THE PROSECUTOR'S CASE BOTH STANDING ALONE AND WHEN VIEWED IN THE CONTEXT OF OTHER EVIDENCE, INCLUDING THE RESPONDENT'S OWN EXCULPATORY TESTIMONY, AND WHERE RESPONDENT WAS UNABLE TO CROSS-EXAMINE HER CODEFENDANT.

A. Factual Background.

Respondent **Clarissa Marsh** was tried jointly with a codefendant, Benjamin Williams. Both were charged and tried under an aiding and abetting theory; the principal defendant, Kareem Martin had not been apprehended at the time of Respondent's trial.[1] Prior to trial, the judge denied Respondent's motion for severance (R. 20).

Both defendants were alleged to have participated in a robbery at the home of Ollie Scott, which culminated in the shooting deaths of two people and serious injury to a third. The jury convicted Respondent of two counts of felony murder and one count of assault with intent to murder.

Williams made a statement to the police after his arrest. He challenged the admission of his statement, but following an evidentiary hearing, the judge ruled that it was voluntarily given (R. 149-150).

Respondent objected to the admission of Williams' statement under *Bruton* v. *United States*, 391 U.S. 123; 20 L.Ed.2d 476; 88 S.Ct. 1620 (1968), arguing that

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[1] Martin was subsequently tried and convicted in 1985.

although it strongly incriminated her, she would be unable to cross-examine Williams (J.A. 90-92). She also renewed her motion for severance (J.A. 100-101).

The trial judge ruled that Williams' statement was admissible against him with deletions of Respondent Marsh's name (J.A. 107). Although trial counsel participated in the editing, both he and the judge made it clear that for purposes of appeal, Respondent's objection to the admission of any portion of Williams' statement remained (J.A. 100; 107-108). Counsel argued that, "[T]here are certain inferences that are raised by this statement even in its altered form that would tend to incriminate my client" (J.A. 91), and that "the statement even as altered and even with the curative instruction, still is the only evidence of certain elements of the crime, and therefore is not cumulative, and would be inadmissible" (J.A. 100).

Williams' original statement read as follows:

> "On Sunday evening, October 29, 1978, at about 6:30 p.m., I was over to my girl friend's house at 237 Moss, Highland Park, when I received a phone call from a friend of mine named Kareem Martin. He said that he had been looking for me and James Coleman, who I call Tom. He asked me if I wanted to go on a robbery with him. I said okay, and he said that he'd be by and pick me up. About 15 to 20 minutes later, Kareem and Clarissa, who I call 'KC', who is Kareem's girl friend, came by in his black Monte Carlo car. I got in the car and Kareem and Clarissa told me that we were going to stick up this crib where the lady knew them. Clarissa said that the place was a numbers house where she used to work and the lady knew her so there would be no trouble getting in because she owed her a hundred dollars and she would let them in. Kareem said that there would be over $5000 or 10,000 in the place. Kareem said that the [sic] would have to take them out after the rob-

bery because they knew them. Kareem had a big silver gun and he gave me a long barrel .22 caliber revolver. We then drove over to this house and parked the car across the street near the house. The plan was that I was supposed to wait outside until they got inside and then KC (Clarissa) was supposed to come out on the porch and let me know that Kareem had stuck the place up. Wait a minute, the plan was that I would wait in the car in front of the house until KC signaled me and the [sic] I would move the car down across the big street because they didn't want anyone to see the car. Okay Kareem and KC went up to the house and went inside. A couple of minutes later KC came out on the porch and waived. I moved the car and walked up to the house. I knocked on the door and KC opened the door. As I entered Kareem and this older lady were in the diningroom and this little boy and another younger woman were sitting on the couch in the front room. I pulled my pistol and told the younger woman and the little boy to lay on the floor. Kareem took the older lady upstairs and he had a pistol also. I stayed downstairs with the two people on the floor and KC. After Kareem took the lady upstairs, I went upstairs and the lady was laying the bed in the room to the left as you get up the stairs. The lady had already given KC two bags full of money before we had ever got upstairs and she had put them in her purse. Kareem, had thought that she had more money and that's why we went upstairs. Me and Kareem started searching the rooms but I didn't find any more money. Before Kareem took the lady upstairs, the lady was asking Clarissa, 'Why are you doing this to me?' Clarissa didn't answer her as I recall. I came downstairs and then Kareem came down with the lady. I said, 'Let's go, let's go'. Kareem said no. Kareem then took the two ladies and the little boy down the basement and that's when I left to go to the car. A couple of minutes later KC came to the car. She got behind the wheel and drove the car around the corner from the house and parked on the big street. A couple of minutes later, Kareem came to

the car and said he thinks that the girl was still living because she was still moving and he didn't have any more bullets. He asked me how come I didn't come down the basement and I said, 'I wasn't doing no shit like that'. They then dropped me back off at my girl's house in Highland Park and I was supposed to get together with him today and get my one-third share of the robbery after he had counted the money. That's all.

Signed, Benjamin Williams.

Completed 12:45 a.m., 10-31-78.

Sergeant Richard Davies.

Sergeant Daniel McCarty." (J.A. 102-107).

This was typed into the record outside the presence of the jury. After the jurors were brought back in, they heard the following edited version of Williams' statement:

"On Sunday evening, October the 29th, 1978, at about 6:30 p.m., I was over to my girl friend's house at 237 Moss, Highland Park, when I received a phone call from a friend of mine named Kareem Martin. He said he had been looking for me and James Coleman, who I call Tom. *He asked me if I wanted to go on a robbery with him. I said okay. Then he said he'd be by and pick me up. About 15 or 20 minutes after Kareem came by in his black Monte Carlo car. I got in the car and Kareem told me he was going to stick up this crib, told me the place was a numbers house.* Kareem said there would be over $5000 or $10,000 in the place. *Kareem said that he would have to take them out after the robbery. Kareem had a big silver gun. He gave me a long barrelled .22 revolver.* We then drove over to this house and parked the car across the big street near the house. The plan was that I was would wait in the car in front of the house and then I would move the car down across the big street because he didn't want anybody to see the car. Okay, Kareem went up to the house and went inside.

> A couple of minutes later I moved the car and went up to the house. As I entered, Kareem and this older lady were in the diningroom, a little boy and another younger woman were sitting on the couch in the front room. I pulled my pistol and told the younger woman and the little boy to lay on the floor. Kareem took the older lady upstairs. He had a pistol, also. I stayed downstairs with the two people on the floor. After Kareem took the lady upstairs I went upstairs and the lady was lying the bed in the room to the left as you get up the stairs. The lady had already given us two bags full of money before we ever got upstairs. Kareem had thought that she had more money and that's why we went upstairs. Me and Kareem started searching the rooms but I didn't find any money. I came downstairs and then Kareem came down with the lady. I said, 'Let's go, let's go'. Kareem said no. Kareem then took the two ladies and the little boy down the basement and that's when I left to go to the car. I went to the car and got in the back seat. A couple of minutes later, Kareem came to the car and said he thinks that the girl was still living because she was still moving and he didn't have any move [sic] bullets. He asked me how come I didn't go down the basement and I said I wasn't doing no shit like that. He then dropped me back off at my girl's house in Highland Park and I was supposed to get together with him today, and get my share of the robbery after he had counted the money. That's all." (J.A. 119-123). (Emphasis added).

The trial judge then instructed the jury that the statement could not be used as evidence against Respondent Marsh (J.A. 126-127).

Williams chose not to testify; therefore, Respondent was unable to cross-examine him about his statement to the police.

Testifying in her own behalf, Respondent Marsh said that on the night in question, Martin, her boyfriend,

pressured her into going to Ollie Scott's house for the purpose of borrowing money (J.A. 168-169). Respondent owned a black Monte Carlo (J.A. 154). She testified that they picked up a friend of Martin before going to Scott's, and that after she and Martin were in Scott's house for awhile, Martin's friend rang the doorbell (J.A. 170; 177).

The Respondent said that in the car, she heard no talk of a robbery and saw no guns before they arrived at Scott's house (J.A. 170-171; 196).

Thus, while Respondent's testimony was exculpatory standing by itself, it placed her in the black Monte Carlo at the time Williams said that he and Martin discussed robbing and killing the people at the Scott house. That alleged discussion was the only direct evidence of a preconceived plan to rob and kill.

Following unsuccessful appeals in the Michigan courts, Respondent sought a writ of habeas corpus in the Federal District Court for the Eastern District of Michigan. Denying the writ, the District Judge held that *Bruton* v. *United States*, *supra*, does not apply if the inculpatory inference of a codefendant's hearsay statement is derived only in the context of other, admissible evidence, and that the admission of a statement which does not name or implicate a defendant on its face does not violate the Confrontation Clause of the Sixth Amendment.

The Sixth Circuit Court of Appeals reversed:

> "We reject the approach which limits the appraisal of the inculpatory value of an extrajudicial statement to the face of the statement itself. Such an approach ignores the true incriminatory effect of the statement, and, with no countervailing benefit, sanctions the use of the admittedly inadmissible evidence while ignoring the practical limitations inherent in the jury system as recognized by the Court in *Bruton*. Sanc-

> tioning the admission of an extrajudicial statement in circumstances in which a substantial risk exists that the statement will be used against the defendant not only denies the Sixth Amendment right to confrontation, but raises serious due process concerns regarding the validity of the conviction and the fundamental fairness of the trial process." *Marsh* v. *Richardson*, 781 F.2d 1201, 1212 (6th Cir. 1986).

This Court granted certiorari to determine this Sixth Amendment question upon which the Federal Circuit Courts appear to be divided.[2]

B. *Bruton* And The Right Of Confrontation.

In *Bruton* v. *United States*, *supra*, this Court held that the admission at a joint trial of a non-testifying accom-

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[2] The Second, Sixth, Seventh, and D.C. Circuits have all used an approach which assesses the incriminating effect of the hearsay in the context of other, admissible evidence. *United States* v. *Gonzales*, 555 F.2d 308 (2d Cir. 1977); *United States ex rel. La Belle* v. *Mancusi*, 404 F.2d 690 (2d Cir. 1968); *Marsh* v. *Richardson*, *supra*; *English* v. *United States*, 620 F.2d 150 (7th Cir. 1980); *United States* v. *Key*, 725 F.2d 1123 (7th Cir. 1984); *Serio* v. *United States*, 401 F.2d 989 (D.C. Cir. 1968).

The Fifth Circuit and the Eleventh Circuit have expressed a preference for a rule which does not look beyond the face of the codefendant's confession, but have cautioned that there may be circumstances where a facially non-inrciminating confession becomes strongly inculpatory in the context of extrinsic evidence. *Clark* v. *Maggio*, 737 F.2d 471, 478 (5th Cir. 1984); *United States* v. *Pendegraph*, 791 F.2d 1462, 1465 (11th Cir. 1986).

The Third and Ninth Circuits adhere to a *per se* rule that a reviewing court may not look beyond the face of the extrajudicial statement. *United States* v. *Belle*, 593 F.2d 487 (3d Cir. 1979); *United States* v. *Tavelman*, 650 F.2d 1133 (9th Cir. 1981). Although *Tavelman* cited *United States* v. *Belle*, *supra*, for support, it noted that "even if there was *Bruton* error, it was harmless beyond a reasonable doubt." 650 F.2d at 1139.

plice's statement which is powerfully incriminating as to the defendant violates the Sixth Amendment right of confrontation. *Bruton* further held that in this context, the risk that the jury would improperly use the declarant's statement against the defendant is so great, and the consequences to the defendant so vital if the jury does so, that cautionary instructions will not cure the prejudice:

> "Despite the concededly clear instructions to the jury to disregard Evans' inadmissible hearsay evidence inculpatory petitioner, in the context of a joint trial we cannot accept limiting instructions as an adequate substitute for petitioner's constitutional right of cross-examination. The effect is the same as if there had been no instruction at all." 391 U.S. at 137.

Bruton itself involved a situation where the accomplice's statement directly implicated the defendant by name. But that fact was not central to the *Bruton* rationale; rather, the case outlined in more general terms the facts which would bring the Confrontation Clause into play:

> "Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial. Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others. The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination. It was against such threats to a fair trial that the Con-

> frontation Clause was directed. Pointer v Texas, supra." 391 U.S. at 135-136. (Footnotes omitted).

Thus, the *Bruton* Court identified three factors which can combine to deny a defendant the right of confrontation: (1) the lack of opportunity to cross-examine, (2) the "powerfully incriminating" nature of the extrajudicial statement, and (3) the unreliability of the extrajudicial statement.

That *Bruton* is not limited to extrajudicial statements which directly name a defendant is best understood by viewing that case, and the three factors in particular, in the context of Sixth Amendment jurisprudence as developed by this Court over the last 21 years.

The preeminent goal of the Confrontation Clause is to guarantee the integrity of the truth-finding process. In *Pointer* v. *Texas*, 380 U.S. 400, 405; 13 L.Ed.2d 923; 85 S.Ct. 1065 (1965), Justice Black wrote:

> "There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal."

This Court has consistently viewed the Confrontation Clause as instrumental to the accurate determination of truth at criminal trials and hence to the reliability of verdicts. *Dutton* v. *Evans*, 400 U.S. 74, 89; 27 L.Ed.2d 213; 91 S.Ct. 210 (1970) ("The decisions of this Court make it clear that the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials . . ."); *Parker* v. *Randolph*, 442 U.S. 62, 73; 60 L.Ed.2d 713; 99 S.Ct. 2132 (1979) ("The right of confrontation conferred by the Sixth

Amendment is a safeguard to ensure the fairness and accuracy of criminal trials"); *Lee* v. *Illinois*, 476 U.S. ___; 90 L.Ed.2d 525-526; 106 S.Ct. ___ (1986) ("The right to confront and to cross-examine witnesses is primarily a functional right that promotes reliability in criminal trials").

It is the convergence of the three factors identified in *Bruton* which obstructs this transcendent Sixth Amendment goal. A closer examination of each factor is therefore appropriate.

1. Denial Of Cross-Examination.

Cross-examination, as the adage goes, is "the greatest legal engine ever invented for the discovery of truth." *California* v. *Green*, 399 U.S. 149, 158; 26 L.Ed.2d 489; 90 S.Ct. 1930 (1970), quoting 5 Wigmore, § 1367. As this Court stated in *Pointer* v. *Texas*, *supra*, 380 U.S. at 404:

> "It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him. And probably no one, certainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case."

Because the lack of an opportunity to cross-examine evidence affects the jury's ability to assess the truthfulness of that evidence, *Bruton* recognized this factor as a trigger for the Sixth Amendment where a nontestifying codefendant's statement is admitted at a joint trial.

2. The Powerfully Incriminating Nature Of The Statement.

It is this factor which is perhaps at the heart of the controversy in Respondent's case. Petitioner would

equate the phrase "powerfully incriminating" with "facially inculpatory," and exclude from Sixth Amendment coverage all other evidence, regardless of how strong a link it formed in the prosecutor's chain of proof or what potential effect it had on the jury's ability to accurately determine the truth. This approach effectively severs *Bruton* from the underlying Sixth Amendment values that case sought to protect.

Bruton was based in part on *Douglas* v. *Alabama*, 380 U.S. 415; 13 L.Ed.2d 934; 85 S.Ct. 1074 (1965), which had been decided three years earlier. In *Douglas*, this Court found a Sixth Amendment violation where the prosecutor, under the guise of cross-examining a separately tried and convicted accomplice who asserted the Fifth Amendment on the stand, read aloud that codefendant's confession at Douglas' jury trial. The confession incriminated Douglas, who was subsequently convicted. Writing for the Court, Justice Brennan characterized the codefendant's confession as follows:

> "The statements from the document as read by the Solicitor recited in considerable detail the circumstances leading to and surrounding the alleged crime; of crucial importance, they named the petitioner as the person who fired the shotgun blast which wounded the victim." 380 U.S. at 417.

Douglas thus identified two kinds of hearsay statements which may unconstitutionally prejudice a defendant: those which name or identify a defendant and those which circumstantially *link* a defendant to the crime. That *Douglas* viewed both types of hearsay as problematic is again reflected later in the opinion:

> "Loyd's alleged statement that the petitioner fired the shotgun constituted the only direct evidence that he had done so; coupled with the description of the

> circumstances surrounding the shooting, this formed a crucial link in the proof both of petitioner's act and of the requisite intent to murder." 380 U.S. at 419.

Having identified two types of hearsay—directly accusatory and circumstantial, or linkage—*Douglas* then related both to what Judge Gibbons of the Third Circuit termed a harm-focused theory of the Confrontation Clause.[3] While not all hearsay testimony would violate the Sixth Amendment, that which is substantially harmful—that is, fundamental to the prosecutor's case and thus particularly prejudicial to the defendant—will trigger the Confrontation Clause:

> "This case cannot be characterized as one where the prejudice in the denial of the right of cross-examination constituted a mere minor lapse. *The alleged statements clearly bore on a fundamental part of the State's case against petitioner.* The circumstances are therefore such that 'inferences from a witness' refusal to answer added critical weight to the prosecution's case in a form not subject to cross-examination, and thus unfairly prejudiced the defendant'." 380 U.SL at 420 [Quoting *Namet* v. *United States*, 373 U.S. 179, 187; 10 L.Ed.2d 278; 83 S.Ct. 1151 (1963)]. (Emphasis added).

But although *Bruton* and *Douglas* acknowedged that the admission of statements which directly accuse may violate the Sixth Amendment, those cases did not hold that *only* such statements will receive scrutiny under the Confrontation Clause. The proper inquiry is broader: Does the statement bear on a fundamental part of the prosecutor's case, and thereby add critical weight to his case in a form not subject to cross-examination? If it does,

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[3] *United States* v. *Belle*, 593 F.2d 487, 503 (3rd Cir. 1979) (dissenting opinion of Gibbons, J.).

then it is "powerfully incriminating." Clearly, linkage testimony may meet this test as much as directly accusatory testimony, especially in cases built upon circumstantial evidence. As Judge Contie, writing for the Sixth Circuit, observed in the present case, the narrow approach urged by the Petitioner "ignores the true incriminating effect of the statement." *Marsh* v. *Richardson*, *supra*, at 1212.

Indeed, the inflexible *per se* rule suggested by Petitioner ignores the reality of how juries decide cases. Jurors, who are carefully instructed not to deliberate, discuss or form conclusions about the case until they have heard *all* the evidence, ultimately view each piece of evidence and testimony in the context of the entire case. Even if inadmissible testimony is not damaging to the defense on its face, if it derives a *strong* inculpatory inference (i.e., one which adds "substantial, perhaps critical weight to the government's case") when linked with the other evidence, then the defendant is faced with the same dilemma as George Bruton: "[T]he *risk* that the jury will not, or cannot, follow instructions is so great, *and the consequences of failure so vital to the defendant*, that the practical and human limitations of the jury system cannot be ignored." *Bruton* v. *United States*, *supra*, 391 U.S. at 135. (Emphasis added).

The foregoing language from *Bruton* reflects the harm-focused analysis of *Douglas* v. *Alabama*, *supra*. If the evidence is substantially harmful to the defense, then the Confrontation Clause is implicated, regardless of whether the evidence is characterized as direct or linkage.

Further, given the harm-focused rationale for bringing "evidentiary linkage" or "contextual implication" within the purview of the Confrontation Clause, it is irrelevant whether the source of the linkage—that is, the admissible

evidence which gives inculpatory flavor to the accomplice's statements—is in prosecution or defense testimony. If anything, linkage through defense evidence results in an even more serious constitutional violation since it infringes upon a defendant's due process right to present a defense and offer testimony. *In re Oliver*, 333 U.S. 257, 273; 92 L.Ed.682; 68 S.Ct. 499 (1947); *Pointer* v. *Texas*, *supra*, 380 U.S. at 405.

In the present case, for example, Williams' statement as redacted had Kareem Martin in an automobile, discussing his premeditated plan to kill the intended robbery victims. The hearsay drew an additional inculpatory meaning in the context of Respondent Marsh's own testimony that she was present in the car with Williams and Martin, and thus arguably in a position to have knowledge of the plan. However, Respondent's testimony was not incriminating by itself—she did not hear the alleged conversation or see Martin produce a gun. Serious constitutional questions therefore arise under the Petitioner's restrictive application of *Bruton:* To avoid a devastating inference from intrinsically unreliable evidence which cannot be cross-examined, must a defendant give up the due process right to present a defense and answer the State's case? Is it consistent with the concept of a fair trial to force a defendant to trade one funadmental constitutional right for another, when both rights work together to protect the reliability of the verdict?

If, as this Court has repeatedly held, *Bruton* "illustrates the extent of the Court's concern that the admission of this type of evidence will distort the truthfinding process," *Lee* v. *Illinois*, *supra*, 90 L.Ed.2d at 527, then the Sixth Circuit's opinion in the present case is in no way a radical departure from or unwarranted expansion of *Bru-*

ton; on the contrary, it is a logical and necessary corallary of that case.

3. Reliability.

This Court has never held that all hearsay must be subject to cross-examination to satisfy the Confrontation Clause. However, in the context of the basic truth-finding function of the Sixth Amendment, the Court has consistently required some extrinsic indicium of reliability as a substitute for cross-examination. In *Ohio* v. *Roberts*, 448 U.S. 56, 65; 65 L.Ed.2d 597; 100 S.Ct. 2531 (1980), the Court stated:

> "Reflecting its underlying purpose to augment accuracy in the factfinding process by ensuring the defendant an effective means to test adverse evidence, the Clause countenances only hearsay marked with such trustworthiness that 'there is not material departure from the reason of the general rule.' *Snyder* v. *Massachusetts*, 291 U.S., at 107, 78 L.Ed. 674, 54 S.Ct. 330, 90 A.L.R. 575."

Bruton v. *United States*, *supra*, took special note of the inherent unreliability of an accomplice's statements, and thus the necessity of confrontation, given "the recognized motivation to shift blame onto others." *Id.*, 391 U.S. at 136.

Likewise, in *Lee* v. *Illinois*, *supra*, 90 L.Ed.2d at 526, Justice Brennan, writing for the majority, remarked:

> "Our cases recognize that this truthfinding function of the Confrontation Clause is uniquely threatened when an accomplice's confession is sought to be introduced against a criminal defendant without the benefit of cross-examination."
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> * * *
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> "Over the years since Douglas, the Court has spo-

> ken with one voice in declaring presumptively unreliable accomplices' confessions that incriminate defendants."[4]

Lee suggested that there may be circumstances which would impart a guarantee of trustworthiness to a codefendant's confession, but was careful to note that the burden is on the prosecutor "to overcome the weighty presumption against the admission of such uncross-examined evidence." *Id.*, 90 L.Ed.2d at 529-530. See also, *New Mexico* v. *Earnest*, ___ U.S. ___; ___ L.Ed.2d ___; ___ S.Ct. ___; 39 Cr. L. 3253 (1986) (concurring opinion of Justice Rehnquist).[5]

Thus, as with the other two *Bruton* factors—denial of cross-examination and the powerfully incriminating character of the evidence—the inclusion of lack of reliability as a decisional basis of that case is a direct function of the Sixth Amendment's concern for ensuring the reliability of the verdict.

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[4] Significantly, *Lee* refers to confessions that *incriminate* defendants, not confessions that *name* defendants. This reflects the Court's concern in *Douglas* that substantially harmful inferences may have their genesis in both directly accusatory and linkage testimony.

[5] In *Lee*, the codefendant's confession was actually considered as substantive evidence by the judge in a bench trial. Therefore, it was not strictkly speaking a *Bruton*-type case because it was not concerned "with the effectiveness of limiting instructions in preventing spill-over prejudice to a defendant when his codefendant's confession is admitted against the codefendant at a joint trial." *Id.*, 90 L.Ed.2d at 527.

In the present case, however, the prosecutor at trial conceded that Williams' statement was inadmissible against Respondent Marsh, tacitly, if not explicitly acknowledging its inherent unreliability. From the time of trial onward, the issue in this case has been squarely framed as involving the applicability of *Bruton* v. *United States* to these facts.

To summarize, the *Bruton* rule is a practical rule designed to protect the integrity of the truth-finding process. If a codefendant's extrajudicial statement is admitted into evidence against the codefendant, and if that statement meets each of the three criteria set forth in the case—it is not subject to cross-examination, it is powerfully incriminating and it is unreliable—then the Confrontation Clause does not permit the greatly elevated risk that the jury will disregard cautionary instructions and improperly use the evidence in convicting the defendant. In such a case, it is as though no instruction were given, and the situation becomes akin to *Douglas* v. *Alabama, supra,* where the challenged evidence was admitted directly against the defendant. If the three *Bruton* factors are present, both the risk of jury misuse and the harm to the defendant are equally great regardless of whether the codefendant's statement is inculpatory on its face or becomes inculpatory when linked with other evidence.

C. Post-*Bruton* Developments.

Following the *Bruton* decision, two other factors emerged as significant in this type of issue: the harmless error rule and the effect of interlocking confessions.

1. The Harmless Error Rule.

In *Harrington* v. *California,* 395 U.S. 250; 23 L.Ed.2d 894; 89 S.Ct. 1726 (1969), this Court held that Sixth Amendment violations under *Bruton* v. *United States, supra,* are subject to the harmless error test of *Chapman* v. *California,* 386 U.S. 18; 17 L.Ed.2d 705; 87 S.Ct. 824 (1967). Making its own assessment of the probable impact of the codefendant's statements on the minds of an average jury, the Court concluded that not only were those

admissions cumulative to the other evidence, "[b]ut apart from them the case against Harrington was so overwhelming that this violation of Bruton was harmless beyond a reasonable doubt." 395 U.S. at 254.[6]

The Court had occasion to apply the *Chapman-Harrington* harmless error test in two subsequent cases involving *Bruton* violations. In *Schneble* v. *Florida*, 405 U.S. 427, 432; 31 L.Ed.2d 340; 92 S.Ct. 1056 (1972), the Court held that "unless there is a reasonable possibility that the improperly admitted evidence contributed to the conviction, reversal is not required." Observing that the independent evidence of guilt was overwhelming, *Schneble* found the *Bruton* error harmless.

Likewise in *Brown* v. *United States*, 411 U.S. 223; 36 L.Ed.2d 208; 93 S.Ct. 1565 (1973), the Court held the *Bruton* error harmless where "[t]he testimony erroneously admitted was merely cumulative of other overwhelming and largely uncontroverted evidence properly before the jury." *Id.*, 411 U.S. at 231.

2. Interlocking Confessions.

In *Parker* v. *Randolph*, *supra*, the Court considered the application of *Bruton* to a situation where the defendant's own confession was admitted into evidence along with his codefendant's confession. Writing for four members of the Court, Justice Rehnquist stated that where a defendant's confession "interlocks" with the extrajudicial

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[6] However, *Harrington* did suggest that the mere fact that an extrajudicial statement is not facially inculpatory of a defendant does not automatically render admission of the statement harmless error. For the circumstances of the case and the details of the confession may make it "as clear as pointing and shouting that the person referred to was" the defendant. *Id.*, 395 U.S. at 253.

statement of his accomplice, *Bruton* does not apply, and "the admission of interlocking confessions with proper limiting instructions conforms to the requirements of the Sixth and Fourteenth Amendments to the United States Constitution." *Id.*, 442 U.S. at 75.

The plurality's view that *Bruton* was inapplicable was based on the absence of two of the three *Bruton* factors discussed previously. First, in light of the defendant's own confession, the codefendant's statement was not "powerfully incriminating," that is, it did not add substantial weight to the prosecutor's case:[7]

> "Thus, the incriminating statements of a codefendant will seldom, if ever, be of the 'devastating' character referred to in Bruton when the incriminated defendant had admitted his own guilt. The right protected by Bruton—the 'constitutional right of cross-examination,' id., at 137, 20 L Ed 2d 476, 88 S Ct 1620—has far less practical value to a defendant who has confessed to the crime than to one who has consistently maintained his innocence." 422 U.S. at 73.

Secondly, the inherent unreliability of an accomplice's statement is a less significant factor when the statement parallels the defendant's confession:

> "Nor does the natural 'motivation to shift blame onto others,' recognized by the Bruton Court to render the incriminating statements of codefendants 'inevitably suspect' . . . require application of the

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[7] The plurality reasoned that a codefendant's facially incriminatory confession becomes less incriminatory *in the context of extrinsic evidence*, i.e., the defendant's own confession. This is evidentiary linkage in reverse, and is conceptually equivalent to the approach followed by the Sixth Circuit in this case, where the statement becomes *more* incriminating in the context of other evidence.

> Bruton rule when the incriminated defendant has corroborated his codefendant's statements by heaping blame onto himself."

However, Justice Rehnquist drew a careful distinction between a defendant like Randolph, who confesses his own guilt, and one "who has, insofar as the jury is concerned, maintained his innocence from the beginning." *Id.*. 442 U.S. at 72. In the latter case, he left no doubt that the strictures of *Bruton* would apply undiluted:

> "When, as in Bruton, the confessing codefendant has chosen not to take the stand *and the implicated defendant has made no extrajudicial admission of guilt*, limiting instructions cannot be accepted as adequate to safeguard the defendant's rights under the Confrontation Clause." 442 U.S. at 74 (emphasis added).

Justice Blackmun, concurring in the judgment in *Parker* v. *Randolph*, eschewed an approach which viewed interlocking confessions cases as if no *Bruton* violation occurred at all, opting instead for the traditional harmless error analysis under *Chapman* v. *California*, *supra*, and *Harrington* v. *California*, *supra*. Justice Blackmun expressed a concern that the two confessions might interlock in part only, or that one might go much farther than the other in implicating the defendant. Although he believed that error in most interlocking confessions cases would be harmless, he concluded that merely because the codefendant's "confessions may interlock to some degree does not ensure, as a *per se* matter, that their admission will not prejudice a defendant so substantially that a limiting instruction will not be curative." 442 U.S. at 79.

The *Parker* dissent agreed that the preferable approach to interlocking confessions cases involves application of the harmless error standard.

In *Lee* v. *Illinois*, *supra*, 90 L.Ed.2d at 529, the Court cited Justice Blackmun's concurring opinion in *Parker* v. *Randolph* in holding that "confession is not necessarily rendered reliable simply because some of the facts it contains 'interlock' with the facts in the defendant's statement." *Lee* involved the admission of a nontestifying accomplice's confession as substantive evidence against the defendant at a bench trial. The key to the resulting Sixth Amendment error in *Lee* was that although the two defendants' confessions overlapped factually to a great extent, they diverged on crucial trial issues:

> "The subjects upon which these two confessions do not 'interlock' cannot in any way be characterized as irrelevant or trivial. The discrepancies between the two go to the very issues in dispute at trial: the roles played by the two defendants in the killing of Odessa, and the question of premeditation in the killing of Aunt Beedie." *Id.*

Lee v. *Illinois* casts doubt on the vitality of the plurality opinion in *Parker* v. *Randolph*. At the very least, two confessions would have to interlock on all but trivial or irrelevant facts in order for the Court to say that no *Bruton* violation occurred at all. Where a defendant has made no extrajudicial admission of guilt, or where a defendant's confession differs from his codefendant's on significant issues, *Bruton* applies, subject to the harmless error test.

D. Application Of *Bruton* To Respondent's Trial.

Regardless of whether Williams' statement incriminated Respondent on its face or when linked to other evidence, the application of the factors discussed above demonstrates that its admission at their joint trial violated Respondent's right of confrontation under *Bruton* v. *United States*, *supra*, because:

1. Respondent had no opportunity to cross-examine Williams;

2. Williams' statement, both standing alone and in the context of other evidence, added substantial weight to the prosecutor's case against the Respondent;

3. Williams' statement was extremely unreliable;

4. The Respondent consistently maintained her innocence, and there was no interlocking confession; and

5. The admission of Williams' statement was not harmless beyond a reasonable doubt.

Since Williams asserted his Fifth Amendment right not to testify, there is no question that he was not available for cross-examination. The other four factors will be discussed individually.

1. Williams' Statement Was Powerfully Incriminating.

The prosecutor's theory at trial was that the defendants planned to rob Ollie Scott and that the shootings were within the scope of the robbery. It was also the prosecutor's theory that the Respondent was an aider and abettor. To convict her as such under Michigan law, he was required to prove that she "aided and abetted in the prepa ration of the crime knowing that (her) coparticipants had the necessary specific intent." *People* v. *Sharp*, 57 Mich. App. 624, 626; 226 N.W.2d 590 (1975). See also, *People* v. *Poplar*, 20 Mich. App. 132, 136; 173 N.W.2d 732 (1969) (". . . [T]he criminal intent of the aider and abettor is presumed from his actions *with knowledge of the [principal's] wrongful purpose.*") (Emphasis added).

Therefore, both for the assault with intent to murder charge and the two felony murder charges, proof of Respondent's knowledge of and participation in a precon-

ceived plan to rob and kill the victims was extremely important to the prosecution.

Williams' statement, as redacted, refers to Kareem Martin's plan to "take out," or kill the victims after the robbery. This was the *only* direct evidence of a preformulated plan to kill. The very existence of an articulated plan was strong evidence in that it tended to negate the otherwise plausible theory that the shootings were a premeditated act first conceived by Martin *after* the robbery and *after* Respondent had left the premises.

Williams' description of the plan therefore makes his redacted statement strongly incriminatory *on its face*, even without reference to other testimony. Thus, even under Petitioner's interpretation, there was *Bruton* error.

But of course the statement drew an even stronger inculpatory inference in the context of Respondent's testimony that she was in the car with Martin and Williams as they drove to Ollie Scott's house. The inference is that she was in a position to hear the plan, and therefore any assistance she offered during the robbery was done with the knowledge that the victims were to be killed.

That inference was absolutely crucial to the Respondent's successful prosecutions as an aider and abettor.[8] The prosecutor explained it to the jury this way:

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[8] Williams was also tried on an aiding and abetting theory, and the prosecutor explicitly argued to the jury that his statement showed knowledge:

> "You will recall that he knew, in his statement that he made, in his confession—that he knew even before he went over to the home on Mendota that there was going to be a killing. Kareem said that he would have to take them out after the robbery. This is what he knew before he went to the home." (J.A. 311-312).

> "The People's theory is that the entire robbery was planned by the two Defendants and Kareem Martin prior to going over to Mrs. Scott's house." (J.A. 321-322).

The prosecutor further argued that "Clarissa Marsh was in the planning stages of the robbery" (J.A. 339).

In short, if the Respondent had no knowledge of Martin's plan to kill she would not be guilty of the charged offenses, because without that knowledge, she could not have shared in his intent to kill. Significantly, she was not even present when the killings took place.

Like *Douglas* v. *Alabama*, *supra*, 380 U.S. at 420, Williams' statement "bore on a fundamental part of the State's case." Also like *Douglas*, the statement was "the only direct evidence" of a fact crucial to the prosecution. *Id.*, at 419. Like *Bruton* v. *United States*, *supra*, 391 U.S. at 127-128, the evidence of Martin's plan, as described in Williams' statement, "added substantial, perhaps critical weight to the Government's case in a form not subject to cross-examination."

Therefore, both standing alone and linked with the Respondent's own exculpatory testimony, Williams' statement was "powerfully incriminating" as to the Respondent, as that term is properly understood in the context of *Bruton*.

2. Williams' Statement Was Unreliable.

There is absolutely nothing about William's statement, or the circumstances under which it was made, which would overcome the strong presumption that as an accomplice's confession, it is inherently unreliable. In fact, the very reason for the presumption of unreliability—"the

recognized motivation to shift the blame onto others"—is apparent from the text of the statement.[9]

While Williams admitted participating in the robbery, his confession was a transparent attempt to exculpate himself from the murder charges by shifting blame onto his codefendants. According to the confession, it was Kareem Martin, not he, who conceived of the plan to "take out" the victims; it was Martin and Clarissa Marsha, not he, who planned the robbery and explained his part to him; it was Martin, not he, who took the victims to the basement. And, said Williams, when Martin later asked him why he didn't come down to the basement, Williams protested that he "wasn't doing no shit like that."

The unreliability of Williams' statement is further shown by the fact that it is at odds not only with Respondent's testimony, but also with that of complaining witness Cynthia Knighton, who testified that Williams was in the basement with a gun when the shootings occurred.

In addition, the prosecutor himself argued in closing that portions of Williams' statement were an attempt to deflect blame for the killings onto someone else:

> "You may ask yourselves about the confession that the Defendant made where he confessed to the robbery and tried to take himself out of any participation in the shooting. I submit that it's understandable to make a statement, as Mr. Williams did to the police, especially under the circumstances . . . So it's clear when you look at his statement and he tries to take himself out of it that it's not enough for a reasonable doubt." (J.A. 316).

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[9] In assessing reliability, it would be appropriate to examine the unedited statement, at least in terms of the declarant's motivation.

Here, the prosecutor apparently recognized what this Court observed in *Lee* v. *Illinois*, *supra*, 90 L.Ed.2d at 529: "The true danger inherent in this type of hearsay is, in fact, its selective reliability." Williams' statement is a classic unreliable accomplice's confession, and as such falls squarely within the ambit of *Bruton* v. *United States*.

3. No Interlocking Confessions.

The fact that the Respondent herself testified does not bring this case within the "interlocking confession" rule of *Parker* v. *Randolph*, *supra*, for two reasons. First, the Respondent made no extrajudicial admission of guilt, and her in-court testimony was completely exculpatory. As far as the jury was concerned, she maintained her innocence from the beginning. *Id.*, 442 U.S. at 72. Thus, the practical value of cross-examination was not diminished, as it would be with a "defendant whose own admission of guilt stands before the jury unchallenged." *Id.*, at 73.

Secondly, the Respondent's testimony did nothing to corroborate the portion of Williams' confession which was central to the prosecutor's case: that there was a preformulated and articulated plan to rob and kill. In other words, Respondent's testimony does not impart any reliability to her codefendant's statement. *Lee* v. *Illinois*, *supra*.

In short, neither the inherent unreliability of Williams' statement nor the devastating harm flowing from it was mitigated by the Respondent's testimony, and therefore there is no reason to depart from the rule of *Bruton* v. *United States*.[10]

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[10] The Sixth Circuit recognized the inapplicability of *Parker* v. *Randolph* to this case: "Although Marsh described her participation in the scheme in this case, she admitted no guilt, and her testimony and Williams' statement do not 'interlock' regarding the crucial facts relative to intent." *Marsh* v. *Richardson*, *supra*, at 1207, fn. 5.

4. The Error Was Not Harmless.

Having determined that Respondent's right of confrontation was violated, the remaining question is whether the error was harmless beyond a reasonable doubt under the facts of this case. *Chapman* v. *California, supra; Harrington* v. *California, supra.* There are three compelling reasons why the erroneous admission of Williams' statement at the joint trial cannot be considered harmless.

First, apart from the statement, the other evidence on the issue of intent and knowledge was circumstantial, ambiguous, and far from the overwhelming type of independent evidence which rendered the *Bruton* error harmless in cases such as *Harrington, Schneble* and *Brown.*[11] The prosecutor's chief witness was Cynthia Knighton, who testified to the following facts.

1. Before any trouble began, she saw Clarissa Marsh and a man (Kareem Martin) in the house talking to her aunt, Ollie Scott (J.A. 28-30)[12]

2. Respondent said that she came to "pick something up" (J.A. 33).

3. At some point during the conversation, Martin pulled a gun, and said that Ollie Scott knew something about someone being killed; Respondent also said that

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[11] Throughout her appeal, Respondent argued that the evidence was insufficient as a matter of law under *Jackson* v. *Virginia*, 443 U.S. 307; 61 L.Ed.2d 560; 99 S.Ct. 2781 (1979). The Sixth Circuit expressly declined to address this issue in light of its conclusion that the convictions were obtained in violation of the Sixth Amendment. *Marsh* v. *Richardson, supra*, at 1201, fn. 1.

[12] Obviously, Knighton was not in a position to testify about anything which occurred before the defendants arrived at Scott's house.

Scott knew something about a killing (J.A. 34-35). These were the last words she heard spoken by Clarissa Marsh.

4. After Martin pulled the gun, Respondent walked to the front door (J.A. 37).

5. At some point, the doorbell rang; Respondent opened the door, and Williams entered (J.A. 39-41).

6. Martin took Ms. Scott upstairs, and Williams went into the next room (J.A. 46-47). Respondent remained by the door (J.A. 47). Ms. Knighton and her son ran towards the door where Respondent was standing (J.A. 47).

7. Respondent "grabbed" Ms. Knighton when she ran for the door, but didn't say anything. Williams came in from the adjacent room and told her and her son to sit back down on the floor (J.A. 47-48).

8. Williams told Knighton and her son to go into the basement (J.A. 59). Once Knighton left the living room, she never saw the Respondent again, and she did know whether Respondent was even in the house when everyone else went into the basement (R. 229-239.)[13]

The prosecutor argued that Respondent's behavior in the house was circumstantial evidence that she was acting according to a plan (J.A. 329). But even if this evidence was probative of a preplanned *robbery*, it gave little or no support to the inference that Respondent knew and intended that murdering the victims was part of the plan.[14]

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[13] Knighton's testimony on this point tends to corroborate Respondent's own testimony that she left the house when everyone else went into the basement (J.A. 187).

[14] Every court which has written to the sufficiency of evidence on intent in this case has conceded that the prosecutor's case was not overwhelming. The Michigan Court of Appeals called it "a close

In *Harrington* v. *California*, this Court based its decision in part on the fact that "the case against Harrington was not woven from circumstantial evidence." 395 U.S. at 254. The same cannot be said in Respondent's case.

The second reason for not finding the error harmless is that in contrast to the otherwise weak, circumstantial case against the Respondent, Williams' statement was the only *direct* evidence that killing the victims was an explicit part of the plan. If the jurors believed that Respondent was party to an express, preformulated plan to kill, they would be impelled to believe that she had both knowledge of Kareem Martin's intent to kill and the express malice which would support the murder charges. Without direct proof of the plan which Williams' statement provided, the prosecutor was limited to circumstantial proof of "implied malice," which in the context of this case would mean that Respondent acted in reckless disregard of a known and high degree of risk that death or serious bodily harm might occur.[15]

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question." The Federal District Court noted, "The undisputed evidence at trial showed that Martin fired all of the shots. Although the shootings occured in the basement, no evidence was adduced that Petitioner went into the basement. Moreover, the prosecution presented no evidence that Petitioner had the specific intent to kill." Michigan Supreme Court Justice Charles L. Levin, dissenting from the order denying leave to appeal, referred to "the paucity of evidence of her involvement in a concert of action to rob and kill." While the Sixth Circuit did not address the sufficiency issue, it did refer to "the paucity of other evidence of intent."

[15] Under Michigan law as applied at Respondent's trial, malice is an essential element of all murder, including felony murder. *People* v. *Aaron*, 409 Mich. 672; 299 N.W.2d 304 (1980); *People* v. *Fountain*, 71 Mich. App. 491; 248 N.W.2d 589 (1976). Malice may be either express (the specific intent to kill or to inflict great bodily injury), or implied (to act in reckless disregard of a known and high degree of risk that

The point is not that there was or was not legally sufficient evidence of implied malice,[16] but that it would be much easier for a jury to rely on direct evidence of express malice rather than try to extract the more ethereal inference of implied malice from ambiguous circumstantial evidence. Based on the impelling direct inference created by Williams' confession, its probable impact on the minds of an average jury, *Harrington* v. *California*, *supra*, 395 U.S. at 254, was devastating.

The third reason for not finding the error harmless lies in the way the prosecutor used Williams' statement in closing argument. He set the stage for the jury's misuse of the statement with his theory that the crimes were planned by Martin, Williams and Respondent (J.A. 321-322). He further emphasized Respondent's individual involvement in the planning stages (J.A. 311-312).

Then, speaking to Williams' culpability, the prosecutor referred to Martin's plan to kill the victims, and argued that this was direct evidence of Williams' knowledge and intent as an aider and abettor (J.A. 311-312).

When the prosecutor argued that both defendants were involved in the planning, and then relied on Williams' confession as the only direct evidence of that theory as applied to Williams, his entreaty that the jury not use Williams' statement against Respondent was surely lost in the heat and noise of the explosive innuendo he created.

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death or great bodily injury might occur.) *Id.*; *People* v. *Morrin*, 31 Mich. App. 301; 187 N.W.2d 434 (1971). See *Marsh* v. *Richardson*, *supra*, at 1212, fn. 10.

[16] In *United States* v. *Lane*, 474 U.S. ____; 88 L.Ed.2d 814; 106 S.Ct. ____ (1986), both majority and dissent were agreed "that the harmless error inquiry is entirely distinct from a sufficiency-of-the-evidence inquiry." 88 L.Ed.2d at 826, fn. 13.

The situation reflects the rationale of *Bruton:* despite cautionary instructions, the effect of the inadmissible confession on the minds of the jurors, bolstered by the prosecutor's argument, was indelible.

But what is worse, the prosecutor used Williams' statement *directly* against the Respondent when he suggested that her own testimony was unreliable:

> "Because she was part of the plan. It's important in light of her testimony when she says Kareem drives over to Benjamin Williams' home and picks him up to go over. What's the thing that she says? 'Well, I'm sitting in the back seat of the car'. 'Did you hear any conversation that was going on in the front seat between Kareem and Mr. Williams?' 'No, couldn't hear any conversation. The radio was too loud'. I asked you whether that is reasonable. Why did she say that? Why did she say she couldn't hear any conversation? She said, 'I know they were having a conversation but I couldn't hear it because of the radio'. Because if she admits to the plan, she's guilty of at least armed robbery. So she can't tell you that." (J.A. 326-327).

Thus, the prosecutor not only attempted to impugn the Respondent's credibility, but he argued by negative inference that she in fact heard Martin and Williams discuss the plan to rob and kill the victims. Yet, the very existence of that discussion was based on inherently unreliable evidence which Respondent had no opportunity to cross-examine.[17]

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[17] Respondent is not arguing this issue on a theory of prosecutorial misconduct, nor is it necessary to do so in this case. See *Lee* v. *Illinois*, *supra*, 90 L.Ed.2d at 524, fn. 3. It is irrelevant whether the prosecutor acted in good faith or not when he argued the impermissible linkage to the jury.

Under the facts of this case, it is not only possible but likely that the jury improperly used Williams' confession in determining Respondent's guilt. Far from being insignificant or cumulative, the confession rendered the State's case against the Respondent significantly more persuasive. The Sixth Amendment error in this case was not harmless, but devastating.

And the ultimate harm to the Respondent—and indeed, to society—is the precise harm that the Confrontation Clause was designed to avoid: the verdict is simply not reliable.[18] Absent Williams' confession, the jury might well have found Clarissa Marsh guilty only of a lesser offense, or might have acquitted her altogether. As it stands, the integrity of this verdict and of the process by which it was reached is open to serious doubt. Our Constitution cannot tolerate such a result.

E. Effect On The Administration Of Justice.

Both Petitioner and the United States, as amicus curiae, have argued that to include linkage evidence within the scope of *Bruton* v. *United States* would impose too great a cost on the efficient administration of justice. On the contrary, the cost is quite minimal, especially when balanced against the importance of the Sixth Amendment right of confrontation.

A similar argument was advanced in the *Bruton* case itself, where the Court responded that while "[j]oint trials

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[18] In *Delaware* v. *Van Arsdall*, 475 U.S. ____; 89 L.Ed.2d 674, 684-685; 106 S.Ct. ____ (1986), the Court stated:

> "The harmless error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence . . . and promotes public respect for the criminal process by focusing on the underlying fairness of the trial . . ." (Citations omitted).

do conserve state funds, diminish inconvenience to witnesses and public authorities, and avoid delays in bringing those accused of crime to trial," *Id.*, 391 U.S. at 134, "[w]e secure greater speed, economy and convenience in the administration of the law at the price of fundamental principles of constitutional liberty. That price is too high." *Id.*, 391 U.S. at 135, *quoting People* v. *Fisher*, 249 N.Y. 419, 432; 164 N.E. 336, 341 (Lehman, J., dissenting).

When a right—constitutional or otherwise—affects the very integrity of the trial process, this Court has always been willing to tolerate even substantial inconvenience as an acceptable cost of vindicating that right. For example, in *United States* v. *Mechanik*, ___ U.S. ___; 89 L.Ed.2d 50; 106 S.Ct. ___ (1986), the Court discussed the considerable social costs of reversing a criminal conviction. Writing for the majority, Justice Rehnquist left no doubt that society must absorb those costs when the reliability of the verdict is at stake:

> "These societal costs of reversal and retrial are an acceptable and often necessary consequence when an error in the first proceeding has deprived a defendant of a fair determination of the issue of guilt or innocence." *Id.*, 89 L.Ed.2d at 57.

The great danger of subordinating fundamental constitutional rights to the obsessive quest for efficiency is exemplified in the brief of the United States as *amicus curiae* in this case, where the Solicitor General makes the rather incredible argument that (1) the Sixth Circuit's rule would result in more separate trials for codefendants and (2) such severances are undesirable because they "increase the opportunities for inconsistent verdicts among similarly situated defendants." Brief for the

United States, p. 23.[19] If a defendant's chances of acquittal are greater at a trial where the jury does not hear the inadmissible and unreliable confession of a codefendant, then *a fortiori* the likelihood is great that the jury at a joint trial will misuse the confession in determining the defendant's guilt, despite instructions to the contrary. *Quod Erat Demonstrandum*. The Solicitor General might prefer consistent verdicts to reliable verdicts; the Constitution does not.

Furthermore, applying *Bruton* to circumstantial evidence as well as to direct accusations is unlikely to entail the draconian consequences Petitioner suggests.

For example, Petitioner fears that a doctrine of evidentiary linkage or contextual implication will require the judge to conduct a "trial before the trial," and examine both prosecutorial and defense evidence in order to make an intelligent decision on severance. This argument conveniently ignores the duty placed on the prosecutor himself to ensure a fair trial.[20] The prosecutor is not required to try defendants jointly. Thus, if an inculpatory inference may arise when a redacted confession is linked with other government evidence, the prosecutor will be aware of this before trial, and should be under a duty to seek an alter-

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[19] Of course, in a *Bruton* situation, the defendants are not "similarly situated," since one is denied the right of confrontation.

[20] In *Berger* v. *United States*, 295 U.S. 78, 88; 79 L.Ed.1314; 55 S.Ct. 629 (1935), the Court stated:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done . . . It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

native to a joint trial. In such a case, he would not have to reveal his entire case to the judge.

Furthermore, even if linkage occurs through defense testimony, the prosecutor will generally be on notice if there is a high risk of contamination from codefendant's confession. The present case is a perfect example. Before trial, the prosecutor knew that he was proceeding against both defendants on an aiding and abetting theory and on a theory that both were involved in planning the robbery. He knew the importance of Williams' statement as the only direct evidence of that plan and he knew that Williams' statement placed Respondent in the car when the alleged plan was discussed. He knew that he was going to use that statement against Williams. And although he could not know the precise content of the Respondent's testimony, he knew that she had pled not guilty and would thus challenge his theory that she was an aider and abettor.[21]

Hence, where the prosecutor had strong direct evidence against Williams and weaker circumstantial evidence against Respondent, but tried both on the same basic theory, he was surely on notice of the great potential for spillover from Williams' confession.[22]

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[21] Since Respondent had no prior criminal record, the prosecutor could have reasonably surmised that she would probably testify in her own behalf.

[22] The defense in this case did everything it could be expected to do to prevent the confrontation problem. Before trial, Respondent moved for severance based on a theory of inconsistent defenses which would pit one defendant against the other, as well as on the inculpatory nature of Williams' statement under *Bruton* (J.A. 260-261; 266). He moved to suppress Williams' statement at trial, and renewed the motion for severance after observing that even the redacted statement contained inculpatory inferences (J.A. 100).

When a prosecutor, in spite of this breadth of knowledge before trial, elects to proceed with a joint trial which results in the denial of a defendant's right of confrontation, then he must proceed at his risk.

Petitioner also fails to recognize that there are alternatives to severance.[23] For example, the court could empanel two juries. This has become a common practice in the Recorder's Court for the City of Detroit, where Respondent was tried. Or there would be situations where the extrinsic evidence against the confessing codefendant is so strong that the prosecutor could simply choose not to use the confession against either defendant.[24]

But even when the prosecutor chooses to risk a joint trial, he receives additional protection from the harmless error doctrine. If the disputed confession is merely cumulative to extrinsic evidence which is itself overwhelming, and as a result the confession has little impact on the jury, the defendant's conviction will remain undisturbed on appeal, despite the technical existence of *Bruton* error.

Petitioner also argues that the rule of evidentiary linkage would eliminate the possibility of redaction in all

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[23] As the Court stated in *Bruton*, "Where viable alternatives do exist, it is deceptive to rely on the pursuit of truth to defend a clearly harmful practice." 391 U.S. at 134.

[24] In the present case, there was independent testimony that Williams held a gun on the victims while Martin shot them. Thus, the circumstantial evidence against Williams was much stronger than that against Respondent. In this sense, the direct evidence of a plan contained in Williams' confession had a greater impact on Respondent's case than on Williams', and Williams would probably have been convicted even without his confession.

cases. This argument overlooks the fact that under the rule applied by the Sixth Circuit, only linkage testimony which engenders a *substantially harmful* circumstantial inference will result in a *Bruton* violation. As discussed previously, the prosecutor will generally be in a position to assess the effect of the evidence in relation to the rest of his case.

The more serious problem arises from the Petitioner's *per se* rule of facial incrimination, which would make redaction a panacea, a result of clearly not intended by *Bruton*.[25]

The Solicitor General argues that the evidentiary linkage rule would be subject to mid-trial manipulation by the defendant, who "would be able to make the codefendant's confession appear to be potentially damaging." Brief of United States as Amicus Curiae, p. 21. This suggestion defies common sense. A defendant who has any chance of acquittal is not going to alter his testimony so as to create a powerfully incriminating inference. On the other hand, the defendant against whom the prosecutor has a very strong case will not benefit from tailoring his testimony to the confession, since any error would be harmless under *Harrington* v. *California*, *supra*.

In short, a rule which looks at the incriminatory effect of a nontestifying codefendant's statement in the context of other, admissible evidence will not have a drastic effect on the efficient administration of justice, either state or

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[25] Even the Fifth Circuit, which has expressed a preference for a rule which does not look beyond the face of the codefendant's statement, *United States* v. *Stewart*, 579 F.2d 356, 359 (5th Cir. 1978), subsequently warned, in *Clark* v. *Maggio*, 737 F.2d 471, 476 (1984): "The redaction technique must, however, be employed cautiously to avoid violating the spirit, if not the letter, of *Bruton*."

federal. Indeed, the Federal Circuits which have accepted such a rule—the Second, the Sixth, the Seventh, and the D.C. Circuits—appear to have had little problem in its application.

At the same time, the Sixth Amendment values which are at stake when a defendant's hearsay statement circumstantially adds critical weight to the prosecutor's case are so paramount that any marginal inconvenience created by the evidentiary linkage rule must be accepted as the price of fair trials and reliable verdicts.

F. Williams' Confession Was Not Admissible As Substantive Evidence Against Respondent.

For the first time in the more than seven-year history of this case, the prosecution is arguing that Williams' confession was admissible as substantive evidence against the Respondent, and therefore the Confrontation Clause was not violated. Petitioner cites *Lee* v. *Illinois*, *supra*, in support of this novel proposition.

Petitioner never raised this issue in the Michigan courts. This case has consistently been framed by all parties as involving the application of *Bruton*, which presupposes that the challenged evidence is inadmissible against the defendant, and focuses on the efficacy of cautionary instructions.

Therefore, Petitioner is foreclosed from raising the issue at this late date. In *Cardinale* v. *Louisiana*, 394 U.S. 437, 438; 22 L.Ed.2d 398; 89 S.Ct. 1162 (1969), this Court stated:

> "It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions."

See also, *Michigan* v. *Tyler*, 436 U.S. 499, 512, fn. 7; 56 L.Ed.2d 486; 98 S.Ct. 1942 (1978).

Neither the Michigan courts, the Federal District Court nor the Sixth Circuit has addressed this issue, and it is not properly before this Court.

In addition, the issue as framed by the Petitioner is clearly without merit. As discussed previously, Williams' statement to the police was plainly an attempt to minimize his culpability for the murders by shifting blame onto hs codefendants, and as such, bore all of the classic indications of inherent unreliability recognized in *Douglas*, *Burton* and *Lee*.[26]

There was nothing about the statement or the circumstances under which it was made to impart the substantial indicia of reliability which *Lee* v. *Illinois*, *supra*, would require to exempt it from the necessity of cross-examination. Neither the Respondent's testimony nor Cynthia Knighton's testimony corroborates the crucial portions of Williams' confession relating to knowledge and intent.

Petitioner is correct in his observation that certain hearsay evidence which bears strong indicia of reliability may be used as substantive evidence without offending the Sixth Amendment. But in the present case, there is no basis for relaxing the requirement of confrontation and cross-examination. Under *Lee* v. *Illinois*, *supra*, the strong presumption of unreliability which inheres in Williams' confession stands unrebutted and unrebuttable. The extrajudicial confession was not admissible as substantive evidence.

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[26] See Section D(2), *supra*, for a more complete discussion of why Williams' confession is intrinsically unreliable.

G. Summary.

This issue must be decided in the context of the general purposes of the Sixth Amendment. If any evidence—direct or circumstantial—adds significant weight to the prosecutor's case and at the same time lacks reliablity or trustworthiness, then the lack of opportunity to cross-examine that evidence violates the Confrontation Clause.

In a *Bruton* situation, where a codefendant's confession incriminates a defendant when linked with admissible evidence, the proper analysis is to test the strength, not the source of the inference. If, in the context of the other evidence, the confession adds substantial weight to the prosecutor's case in a form not subject to cross-examination, then *Bruton* applies, subject to a harmless error analysis.

It may be that many confessions which incriminate only indirectly will turn out to be harmless. But a *per se* rule which woodenly refused to look beyond the face of the statement poses too great a threat to the Sixth Amendment and to the reliability of the verdicts in more marginal cases which are woven from circumstantial evidence. Such is the situation in Clarissa Marsh's case. Her constitutional guarantee of a fair trial and an accurately determined judgment can be vindicated only through application of the rule followed by the Sixth Circuit in this case.

CONCLUSION AND RELIEF

WHEREFORE, for all of the foregoing reasons, Respondent asks this Honorable Court to affirm the decision of the Sixth Circuit Court of Appeals.

Respectfully submitted,

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(1)

NO. 85-1433

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

GLORIA RICHARDSON, WARDEN,

PETITIONER

vs.

CLARISSA MARSH, RESPONDENT

REPLY BRIEF OF PETITIONER

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STATEMENT OF THE QUESTION

IS THE ISSUE AS PRESENTED PROPERLY BEFORE THIS COURT?

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OPINIONS BELOW

The opinion of the Federal District Court is appended as Appendix A to the Petition for Certiorari. The opinion of the Sixth Circuit Court of Appeals is reported at 781 F 2d 1201 (CA 6, 1986).

STATEMENT OF JURISDICTION

The judgment of the Sixth Circuit of the Court of Appeals was entered on January 23, 1986. The jurisdiction of this Court is invoked under 28 USC Sec 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> ...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor

deny to any person within its jurisdiction the equal protection of the laws.

The Sixth Amendment to the United States Constitution provides, in part, that "in all criminal prosecutions the accused shall enjoy the right...to be confronted with the witnesses against him."

REPLY ARGUMENT

Petitioner wishes briefly to reply to only one portion of Respondent's argument; namely, that portion where Respondent alleges that a portion of Petitioner's argument is not properly before this Court. In so doing, Respondent misperceives the import of the "not pressed or passed upon below" doctrine. Petitioner will briefly demonstrate that the arguments presented are properly before this Court.

It has long been settled that the "not pressed or passed upon below" doctrine does **not** mean that every **argument** in support of an **issue** must have been pressed upon below--what is required is that the **issue** have been pressed and passed upon below. In Dewey v Des Moines, 173 US 193, 197-198 (1898) this

Court said:

> If the question were only an enlargement of the one mentioned in the assignment of errors, or if it were so connected with it in substance as to form but another ground or reason for alleging the invalidity of the personal judgment, we should have no hesitation in holding the assignment sufficient to permit the question to be now raised and argued. Parties are not confined here to the same arguments which were advanced below upon a federal question there discussed (emphasis added).

See also Stanley v Illinois, 405 US 104 (1972).

The issue in this case is whether Respondent's confrontation rights were violated by the admission into evidence of her codefendant's redacted confession (admitted with a cautionary limiting instruction). The argument advanced below by Petitioner was that contextual implication cannot be employed to find a confrontation violation, an argument

Petitioner continues in this Court. However, even if contextual implication is employed to conclude that the jury likely disregarded the cautionary limiting instructions, if the codefendant's confession is admissible via a hearsay exception <u>against</u> Respondent, Respondent's confrontation rights would nonetheless be intact. Petitioner has thus not attempted to add a new issue in this Court, but "another ground or reason" why confrontation principles are not violated in this case. This is wholly proper.

CONCLUSION

Wherefore, Petitioner respectfully requests that the Sixth Circuit Court of Appeals be reversed.

Respectfully submitted,

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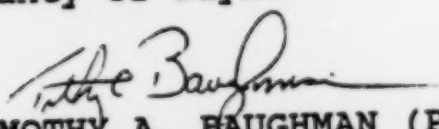

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No. 85-1433

In the Supreme Court of the United States

OCTOBER TERM, 1986

GLORIA RICHARDSON, WARDEN, PETITIONER

v.

CLARISSA MARSH

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the Confrontation Clause of the Sixth Amendment precludes the admission in a joint trial of the confession of a non-testifying co-defendant, where that confession, after redaction, does not name or otherwise identify the complaining defendant as a participant in the crime.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

The issue in this case is whether, under *Bruton* v. *United States*, 391 U.S. 123 (1968), a court may admit at a joint trial the confession of a non-testifying co-defendant, if the confession does not name or otherwise identify the complaining defendant as a participant in the crime. The court of appeals in this case construed *Bruton* quite broadly. It held that a co-defendant's confession may not be admitted at a joint trial if the confession is damaging to the complaining defendant when considered in light of all the other evidence in the case. Finding the confession in this case to be sufficiently inculpatory under that standard, the court of appeals held that the trial court's limiting instructions could not be trusted to prevent the jury from considering the confession against respondent.

The proper application of *Bruton* is an issue presented almost daily in federal criminal trials. In light of the increasing number of multi-defendant prosecutions involv-

ing one or more post-arrest statements, the Court's analysis and resolution of this issue is likely to have a substantial effect on federal criminal practice.

STATEMENT

1. In the evening hours of October 29, 1978, respondent and her boyfriend, Kareem Martin, went to the Detroit home of Ms. Ollie Scott, whom respondent knew from their work in a numbers racket (Pet. App. 16a-17a; Tr. 338-340). When they arrived, the met Cynthia Knighton (Ms. Scott's niece) and Ms. Knighton's four-year-old son Koran (Pet. App. 16a-17a; Tr. 155-157). After a brief conversation, respondent rose from the living room couch and announced that she had come over "to pick something up" from Ms. Scott. Martin then drew a gun and pointed it at Ms. Scott and the Knightons (Pet. App. 17a; Tr. 161-162).

Respondent immediately walked to the front door and began to "look[] out the peephole" (Pet. App. 17a; Tr. 164). Just then the doorbell rang, and respondent opened the door to allow co-defendant Benjamin Williams to enter. He, too, drew a gun, and exclaimed as he passed respondent, "[w]here's the money?" (Pet. App. 17a; Tr. 165-167).

Martin then forced Ms. Scott upstairs, while Williams patrolled the kitchen and respondent remained posted at the front door. With Martin and Williams temporarily out of her way, Ms. Knighton took her son and attempted to flee. Respondent prevented her escape, however, by grabbing her around the shoulders and holding her until Williams ran back into the living room. At that time, Williams ordered the Knightons to lie down on the floor. Pet. App. 17a-18a; Tr. 167-170, 231.

Williams then went upstairs to assist Martin in ransacking the house; respondent remained downstairs with the Knightons and continued to "look out the peephole every now and then" (Pet. App. 18a; Tr. 171-172). Within min-

utes, the two men returned with Ms. Scott. Martin was carrying a grocery bag, which he handed to respondent. Pet. App. 18a, 27a; Tr. 172-174.

Martin then forced Ms. Scott down to the basement; Williams took the Knightons there as well (Pet. App. 18a; Tr. 177-178). Respondent, who was close by, continued to peer through the front door (Tr. 178). In the basement, Ms. Scott was ordered to lie on the floor, while Ms. Knighton and her son knelt in a nearby corner (Tr. 179-181). Martin then fired two shots at Ms. Scott from a distance of one to two inches, striking her in the head and killing her (Pet. App. 18a; Tr. 117, 184). Next, holding a blanket in front of his gun, Martin fired three shots at the Knightons from point blank range (Pet. App. 18a; Tr. 113-115, 184-186, 209). Koran Knighton was killed by a gunshot wound to the neck. His mother was badly wounded, but managed to summon the police. Pet. App. 18a; Tr. 113-116, 186-189.

2. Respondent and Williams were tried jointly.[1] During its direct case, the government offered against Williams a confession he had given to the police following his arrest (Pet. App. 18a; Tr. 288-290). As redacted, the only significant portion of the confession for present purposes was its recitation that on the way to Ms. Scott's house Martin had told Williams that "he would have to take [the victims] out after the robbery" (Pet. App. 19a; Tr. 289). The balance of the redacted confession was essentially cumulative of Ms. Knighton's testimony. The redacted confession made no mention of respondent at all, nor even that a third confederate, apart from Williams and Martin, had participated in the crime.[2]

---

[1] Martin was a fugitive at the time of trial (Tr. 254).

[2] Williams' confession had originally inculpated respondent directly, making clear that respondent had participated in the conversation en route to Ms. Scott's house during which Martin had said that he would have to "take out" their robbery victims (Tr. 261-262, 267-269). Before

Respondent's attorney objected to the admission of the redacted confession against Williams in the joint trial. Relying on this Court's decision in *Bruton* v. *United States*, 391 U.S. 123 (1968), he argued that Williams was not planning to testify at trial, and that "there are certain inferences that are raised by this statement even in its altered form that would tend to incriminate" respondent (Pet. App. 18a; Tr. 260-261). After reviewing the legal authority cited by the parties, the trial court concluded that "the deletions are extensive as compared to the original statement, and any mention whatsoever of [respondent] does not appear in the amended statement. Therefore, this statement will be allowed to be read to the Jury" (Pet. App. 18a-19a; Tr. 270). The court instructed the government not to elicit anything that had been deleted from the statement, and the government took precautions to see that only the redacted version was placed before the jury (Tr. 270-271).

The government thereafter offered the redacted confession into evidence (Pet. App. 19a-20a; Tr. 288-290). As soon as the statement was admitted, the trial court gave the jury the following limiting instruction (Pet. App. 20a-21a; Tr. 292):

> The statement of Co-Defendant Williams has been admitted into evidence against him only. I caution you that it may be used in considering only the guilt or innocence of Defendant Benjamin Williams.

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the confession was admitted at trial, government and defense counsel met and, together, redacted the confession to eliminate all references to respondent. Respondent's attorney reserved the right to object to the admission of the confession, even as redacted. Government counsel had initially preferred simply to substitute the letter "A" for each reference to respondent in the confession. In deference to defense counsel's views, the prosecutor agreed to delete the references to respondent altogether, so that the redacted statement did not even reflect that there was a third participant in the crime. Tr. 263-266.

> Under the rules already given to you, it must not be used or considered in any way against Defendant Clarissa Marsh. To do so would be most unfair and in violation of the oath that you took as Jurors.[3]

After the government rested, respondent took the stand. For the most part, respondent corroborated the case against her: she testified that she had gone to Ms. Scott's house to get money to buy narcotics for Martin; that, once there, "Kareem had pulled a gun out"; that she had opened the door for Williams; that she had grabbed Ms. Knighton when she tried to escape; and that she had received a bag from Martin after he and Williams had come downstairs with Ms. Scott. Pet. App. 21a-22a; Tr. 307-329. In one respect, however, respondent supplemented the government's case against her: answering a question posed by her own attorney, respondent reported that she had been present during the drive to Ms. Scott's house and that she "knew that [Martin and Williams] were talking." She insisted, however, that she had been "sitting in the back and that the radio was on [and that she did not know] what they were talking about." Pet. App. 22a; Tr. 322.

At the outset of his summation the prosecutor reminded the jury that "it's important to consider the evidence separately against each Defendant. And because the evidence must be considered separately, in fairness to each of the Defendants, I would like to argue separately." Tr. 438. The prosecutor began, therefore, by reviewing the evidence against Williams, including the details of Williams' confession (Tr. 443, 446-447). When he turned

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[3] The trial court repeated that instruction immediately before the jury began its deliberations (Jury Charge Tr. 10).

to the evidence against respondent, the prosecutor made clear that the jury should not consider Williams' confession in its deliberations on the case against her (Pet. App. 23a; Tr. 448):

> [Respondent's] guilt, of course, is to be determined separately from the evidence, but you may consider the same evidence that you heard from the witness stand. The only thing that the Court will instruct you that you cannot consider is that statement that was made by the Defendant Williams. You cannot consider that statement when you determine her guilt or innocence. To do so would be unfair. The Court instructed you on that.

The prosecutor then reviewed the evidence against respondent, arguing that it showed her to have been a "lookout" and an active participant in the crime (Tr. 450-451). He also contended that respondent's testimony at trial had been designed simply "to clear herself of this crime" (*id.* at 450). In that connection, the prosecutor analyzed respondent's testimony, in which she had admitted being in the car with Williams and Martin during the drive to Ms. Scott's house but denied having heard any discussion about committing a robbery (Pet. App. 24a; Tr. 452):

> Why did she say that? Why did she say she couldn't hear any conversation? * * * Because if she admits that she heard the conversation and she admits to the plan, she's guilty of at least armed robbery. So she can't tell you that.

Respondent and Williams were convicted on two counts of felony murder and a third count of assault with intent to kill (*id.* at 16a, 24a; Jury Charge Tr. 41-42). The trial court sentenced both defendants to life imprisonment on the felony murder counts and 60 to 90 years' imprisonment on the assault charge (*id.* at 24a-25a; Sentencing Tr. 3, 5).

The Michigan Court of Appeals subsequently affirmed respondent's convictions, and the Michigan Supreme Court denied her application for leave to appeal (Pet. App. 25a-27a).

3. In 1983, respondent filed a petition for a writ of habeas corpus, alleging that the admission of Williams' confession—even with limiting instructions—had violated her Confrontation Clause rights under *Bruton* (Pet. App. 27a).[4] Respondent contended that she was inculpated by Williams' admission that he and Martin had discussed the prospect of having to kill their robbery victims, even though the redacted statement did not identify her as a participant in that conversation. She reasoned that the statement, when considered in light of her own testimony placing herself in the car with Martin and Williams, constituted "powerful" evidence of her intent to commit murder (*id.* at 5a). The district court denied the petition (*id.* at 2a-14a). Holding that *Bruton* applies only to statements that, standing alone, are "powerfully incriminat[ing to] the criminal defendant" (*id.* at 7a), the court refused to extend *Bruton* to a co-defendant's statement of the kind involved in this case, in which the incriminating nature of the statement depends on the jury's linking it with other evidence presented at the trial (*id.* at 6a).

The court of appeals reversed (Pet. App. 15a-67a). While recognizing "the strong presumption that jurors can follow the court's instructions" (*id.* at 34a), the court nevertheless concluded that Williams' confession, "in the context of the evidence in this case, * * * was powerfully incriminating to [respondent] with respect to the critical

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[4] Respondent also challenged the sufficiency of the evidence against her (Pet. App. 27a). The district court rejected this claim (*id.* at 8a-14a), and the court of appeals, in light of its disposition of respondent's *Bruton* claim, did not reach the issue (*id.* at 57a n.1).

element of intent" (*id.* at 52a). The court acknowledged that Williams' statement on its face did not incriminate respondent, but it concluded that the confession must be considered together with respondent's testimony placing herself in the car where, according to Williams' statement, the robbery and murder were discussed (*id.* at 51a).

The court conceded that most courts have refused to apply *Bruton* to statements that do not, on their face, identify another defendant as a participant in the crime (Pet. App. 47a-49a & n.9). Nonetheless, the court concluded that it was required to look beyond the face of the statement to discern its true "inculpatory value" (*id.* at 50a). The court was also moved by what it believed to be the prosecutor's use, in closing argument, of the "impermissible linkage" between the confession and respondent's testimony (*id.* at 52a). In short, the court of appeals held that the admission of Williams' statement in the joint trial "created a substantial risk that the jury would consider Williams' statement in their deliberations regarding [respondent's] guilt" (*id.* at 52a-53a). The court therefore directed the district court to grant the petition for a writ of habeas corpus (*id.* at 56).

SUMMARY OF ARGUMENT

Juries are ordinarily expected to follow a trial court's instructions about how to consider evidence admitted at trial. Our system of trials presumes that well-crafted instructions are sufficient—that juries understand them and obey them. In *Bruton* v. *United States*, 391 U.S. 123 (1968), this Court identified a narrow exception to that premise, holding that "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored" (391 U.S. at 135). In particular, the Court held, limiting instructions will not

suffice "where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial" (*id.* at 135-136).

Purporting to follow *Bruton*, the court of appeals held that it was improper for the trial court to admit Williams' statement at the joint trial. Although the statement, as redacted, did not identify respondent in any way, the court nevertheless held that it was "powerfully incriminating" and therefore violated respondent's Confrontation Clause rights, despite clear instructions to the jury not to consider the statement against respondent. Pet. App. 52a-53a. In so doing, the court of appeals gave *Bruton* a meaning this Court never intended it to have.

Bruton was intended to bar the admission of only those co-defendant statements that clearly identify the complaining defendant as a participant in the crime and are thus too "powerful" for a jury to ignore. By applying *Bruton* to statements that, as redacted, do not even mention the complaining defendant, the court of appeals overlooked the fact that *Bruton* was an exception to the rule that juries can be trusted to follow the trial court's instructions—a rule that has been termed "the premise upon which the system of jury trials functions under the American judicial system" (*Parker* v. *Randolph*, 442 U.S. 62, 75 n.7 (1979)). Moreover, a broad construction of *Bruton*, if routinely applied, would require dramatic revisions in the structure of pre-trial discovery, reduce the number of admissible confessions, and provoke substantial inefficiencies in the conduct of criminal trials—all without promoting any genuine interest of defendants that could not be equally well-served by appropriate limiting instructions to the jury.

ARGUMENT

BRUTON DOES NOT APPLY TO A CO-DEFENDANT'S STATEMENT THAT DOES NOT NAME OR OTHERWISE IDENTIFY THE COMPLAINING DEFENDANT AS A PARTICIPANT IN THE CRIME

A. Juries Ordinarily Can Be Trusted To Follow The Trial Court's Instructions

Our system of jury trials embraces a strong presumption that jurors can and will follow the trial court's instructions. Time and again, this Court has refused to engage in the "unfounded speculation that * * * jurors disregarded clear instructions of the court in arriving at their verdict" (*Opper* v. *United States*, 348 U.S. 84, 95 (1954)). To do so, the Court has noted, would violate "[o]ur theory of trial," which "relies upon the ability of a jury to follow instructions" (*ibid.*).

Applying this fundamental premise, the Court has held, for example, that a defendant's rights were not abridged by the admission, during the guilt phase of a trial, of a prior conviction that was admissible solely for sentencing purposes (*Spencer* v. *Texas*, 385 U.S. 554 (1967)). To say that limiting instructions are constitutionally inadequate to protect against the possible prejudicial effects of such evidence, the Court held, "would make inroads into th[e] entire complex code of state criminal evidentiary law, and would threaten other large areas of trial jurisprudence" (*id.* at 562). The Court refused to take such a step, holding that "the jury is expected to follow instructions in limiting this evidence to its proper function" (*ibid.*).

More recently, in *Marshall* v. *Lonberger*, 459 U.S. 422 (1983), the Court reaffirmed *Spencer*, holding that the Constitution does not forbid the admission, at the guilt phase of trial, of a prior conviction that was admissible only to show that the defendant deserved the death penalty. In so holding, the Court expressly noted that "the trial

judge gave a careful and sound instruction requiring the jury to consider respondent's prior conviction only for [sentencing] purposes" (459 U.S. at 438-439 n.6).

The Court has affirmed the basic premise of jury competence in rejecting the "dubious" and "speculative assumption[]" that jurors would use a defendant's silence at trial against him, despite instructions not to do so (*Lakeside* v. *Oregon*, 435 U.S. 333, 340 (1978));[5] in refusing to find that nine jurors would ignore an instruction to find guilt beyond a reasonable doubt simply because three jurors voted for acquittal (*Johnson* v. *Louisiana*, 406 U.S. 356, 360-361 (1972)); and in applying a harmless error analysis to misjoinder under Fed. R. Crim. P. 8, in part because the Court would not " 'necessarily assume that the jury misunderstood or disobeyed' " the instructions of the trial judge to consider the evidence against each defendant separately (*United States* v. *Lane*, No. 84-744 (Jan. 27, 1986), slip op. 12 n.13, quoting *Blumenthal* v. *United States*, 332 U.S. 539, 553 (1947)).

Prior to *Bruton*, this Court only once expressly departed from the premise that juries are capable of following instructions to consider evidence for one purpose but not for another.[6] In *Jackson* v. *Denno*, 378 U.S. 368 (1964), the

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[5] The Court observed in *Lakeside* that " '[W]e have not yet attained that certitude about the human mind which would justify us in . . . a dogmatic assumption that jurors, if properly admonished, neither could nor would heed the instructions of the trial court' " (435 U.S. at 340 n.11, quoting *Bruno* v. *United States*, 308 U.S. 287, 294 (1939)).

[6] *Burgett* v. *Texas*, 389 U.S. 109 (1967), which is sometimes cited as indicating this Court's distrust of limiting instructions, did not involve a limiting instruction at all. Instead, it involved a curative instruction, directing the jury to ignore altogether certain highly prejudicial evidence that was not admissible for any purpose. In *Burgett*, the prosecution offered evidence of the defendant's prior convictions, at least one of which had been obtained while the defendant was not represented by counsel. The Court held that the admission of the uncounseled conviction was "inherently prejudicial" to the defendant, in

Court held unconstitutional a New York rule that required trial judges to submit to the jury the issue of the voluntariness of a defendant's confession; under that system, the jury was instructed to consider the confession against the defendant only if it first concluded that the confession had been given voluntarily. To make these judgments—to evaluate both the voluntariness and weight of a confession—required the jury to consider, at once, "both the evidence going to voluntariness and all of the corroborating evidence showing that the confession is true and that the defendant committed the crime" (378 U.S. at 381). The Court concluded that an instruction to the jury to ignore a confession once it found the confession to be involuntary was simply too difficult to obey (*id.* at 388):

> Under the New York procedure, the fact of a defendant's confession is solidly implanted in the jury's mind, for it has not only heard the confession, but it has been instructed to consider and judge its voluntariness and is in a position to assess whether it is true

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light of *Gideon* v. *Wainwright*, 372 U.S. 335 (1963) (*Burgett*, 389 U.S. at 115), and that curative instructions from the trial court could not repair the damage. Subsequent decisions of this Court have reiterated that the central premise of *Burgett* was that " '[t]o permit a conviction obtained in violation of *Gideon* v. *Wainwright* to be used against a person either to support guilt or enhance punishment for another offense * * * is to erode the principle of that case' " (*United States* v. *Tucker*, 404 U.S. 443, 449 (1972) (quoting *Burgett*, 389 U.S. at 115)). Accord, *Loper* v. *Beto*, 405 U.S. 473 (1972).

To the extent that *Burgett* was viewed as undermining the validity of limiting instructions regarding prior convictions, the Court dispelled that notion in *Marshall* v. *Lonberger*, 459 U.S. at 438-439 n.6, where the Court upheld an instruction requiring the jury to consider the defendant's prior conviction only for purposes of sentencing and not on the issue of guilt. In light of *Marshall*, *Burgett* is best understood as its terms suggest: as a decision intended to enforce *Gideon*, and not as an exception to the general premise that juries can, and do, follow instructions.

> or false. If it finds the confession involuntary, does the jury—indeed, can it—then disregard the confession in accordance with its instructions?

Because a jury might find it peculiarly "difficult to understand the policy forbidding reliance upon a coerced, but true, confession" (*id.* at 382), the Court held that instructions alone would not suffice; even a well-instructed jury could not decide the voluntariness issue and then assess the weight to be given to the defendant's confession (*id.* at 391 & n.19).

But the Court did not intend for *Jackson* to carve a broad exception from the premise of jury competence. The Court made that point clear in *Watkins* v. *Sowders*, 449 U.S. 341 (1981), a case decided 13 years after *Bruton*. There, the defendants were convicted largely on the strength of the testimony of their victims, who identified the defendants at trial. The defendants contended that the identification testimony was tainted by unduly suggestive pretrial procedures. Relying on *Jackson*, the defendants claimed that instructions alone could not ensure that the jury would cast from its mind the unreliable identification testimony; accordingly, they argued, under *Jackson* the trial court should have decided the admissibility of the identification testimony before submitting it to the jury. This Court rejected that contention. *Jackson*, the Court held, was an unusual case; it did not announce a broad exception to the basic premise that juries can follow instructions. Instead, the Court observed, *Jackson* was based on the "peculiar problems" presented by the issue of the voluntariness of a confession—in particular, the difficulty a jury might have in understanding " 'the policy forbidding reliance upon a coerced, but true, confession.' " *Watkins*, 449 U.S. at 347 (quoting *Jackson*, 378 U.S. at 382). With regard to identification testimony, the Court held, the "peculiar problems" presented in *Jackson* were inapplicable. Therefore, held the Court, although "[a] judicial determination outside the presence of the jury of

the admissibility of identification evidence may often be advisable" (*Watkins*, 449 U.S. at 349), the Constitution does not require a categorical "departure from the presumption that juries will follow instructions" (*id.* at 347). Appropriate jury instructions should ordinarily ensure sufficient fairness to the defendant, the Court concluded, even though, of course, unreliable identification testimony may be "powerfully incriminating" to a defendant (see *id.* at 352 (Brennan, J., dissenting)).[7]

B. *Bruton* Established Only A Narrow Exception To The Presumption That Juries Can Follow Limiting Instructions

Like the decision in *Jackson,* this Court's decision in *Bruton* v. *United States,* 391 U.S. 123 (1968), was intended to carve only a narrow exception from the premise that juries can and will follow limiting instructions. The exception in the case of *Bruton* was designed to cover only those "powerfully incriminating" statements of a nontestifying co-defendant that clearly identify the complaining defendant as a participant in the crime.

The facts of *Bruton* underscore the limited reach of its holding. Bruton and his co-defendant Evans were tried jointly for armed postal robbery. At trial the government offered against Evans two oral confessions he had made, one of which expressly named Bruton as an accomplice in the crime. Evans did not testify at trial. Because Evans'

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[7] Following this Court's lead, the lower federal courts have routinely relied on jury instructions to protect defendants against prejudice from evidence admitted only against another defendant. See, *e.g.*, *United States* v. *Porter,* 764 F.2d 1, 13 (1st Cir. 1985); *United States* v. *Moon,* 718 F.2d 1210, 1232 (2d Cir. 1983), cert. denied, 466 U.S. 971 (1984); *United States* v. *Hines,* 717 F.2d 1481, 1489 (4th Cir. 1983), certs. denied, 467 U.S. 1214 and 1219 (1984); *United States* v. *Reed,* 639 F.2d 896, 907 (2d Cir. 1981); *United States* v. *Davis,* 546 F.2d 617, 620 (5th Cir. 1977); *United States* v. *Pate,* 543 F.2d 1148, 1149 (5th Cir. 1976). See also *United States* v. *Barbieri*, 614 F.2d 715, 720 (10th Cir. 1980).

confessions were concededly hearsay as to Bruton, the trial court instructed the jury that while it could consider the confessions against Evans, those statements were "inadmissible * * * against [Bruton] and therefore had to be disregarded in determining [Bruton's] guilt or innocence" (*Bruton,* 391 U.S. at 125). Both defendants were convicted; on review, this Court reversed. Jury instructions, the Court held, are not always sufficient: "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored" (*id.* at 135). "Such a context," the Court decided, "is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial. Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect * * * . The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination." *Id.* at 135-136.

By its own terms, *Bruton* was a narrow departure from the ordinary presumption that juries are competent to follow instructions. The Court "agree[d] that there are many circumstances in which * * * reliance [on jury instructions] is justified. Not every admission of inadmissible hearsay or other evidence can be considered to be reversible error unavoidable through limiting instructions" (391 U.S. at 135). But the *Bruton* case was different: there, the "substantial, perhaps even critical" impact of Evans' "powerfully incriminating extrajudicial statements" (*id.* at 128, 135) posed a "substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining [Bruton's] guilt" (*id.* at 126).

The Court employed the phrase "powerfully incriminating" advisedly. As Justice Rehnquist wrote in *Parker* v. *Randolph,* 442 U.S. at 73 (plurality opinion): "[t]he Confrontation Clause has never been held to bar the admission into evidence of every relevant extrajudicial statement made by a nontestifying declarant simply because it in some way incriminates the defendant." Evans' statement was particularly memorable: it expressly and unambiguously named Bruton as an accomplice in the robbery (*Bruton,* 391 U.S. at 124). In that respect, the admission of Evans' confession was almost as damaging as a confession from Bruton himself—"the most probative and damaging evidence that c[ould] be admitted against him" (*id.* at 139) (White, J., dissenting).

In delineating the "contexts in which the risk that the jury will not, or cannot, follow instructions is * * * great" (391 U.S. at 135), the Court in *Bruton* relied heavily on its prior decision in *Jackson*—itself a deliberately narrow exception to the presumpton of jury competence. By resting its analysis on *Jackson,* the Court made clear that "powerfully incriminating" refers to those co-defendant statements that are, in substance, like confessions of the defendant himself. It is those statements—and only those statements, we suggest—that limiting instructions may not be able to dislodge from a jury's attention.

This conclusion is buttressed by the *Bruton* Court's reliance on *Douglas* v. *Alabama,* 380 U.S. 415 (1965) (see *Bruton,* 391 U.S. at 126-127). There, the Court held that a defendant's Confrontation Clause rights had been violated when his co-defendant's confession was read aloud to the jury under the guise of cross-examining the co-defendant at trial. Because the co-defendant had asserted his Fifth Amendment rights and refused to testify, Douglas was unable to challenge the truthfulness of the confession. In holding that the use of the co-defendant's confession in this manner violated Douglas' rights, the Court noted that

"of crucial importance" was the fact that the confession "named [Douglas] as the person who fired the shotgun blast which wounded the victim" (*Douglas,* 380 U.S. at 417).

The Court's reliance on *Jackson* and *Douglas* confirms that it intended *Bruton* to apply only to those co-defendant statements that clearly identify the complaining defendant as a participant in the crime. Consistent with that narrow intent, the Court has steadfastly refused to cut *Bruton* loose from its moorings, and has noted that the decision must be "tied to the situation in which it arose" (*Parker,* 442 U.S. at 75 n.7 (plurality opinion)). The year after *Bruton* was decided, for example, the Court refused to extend it to cover a prosecutor's use of a co-defendant's confession in an opening statement (*Frazier* v. *Cupp,* 394 U.S. 731 (1969)). Two years later, in *Nelson* v. *O'Neil,* 402 U.S. 622 (1971), the Court held that limiting instructions were sufficient, notwithstanding *Bruton*, where the confession admitted against the co-defendant implicated the complaining defendant as a confederate, but the co-defendant testified at trial and renounced the confession as false. See also *Schneble* v. *Florida,* 405 U.S. 427 (1972) (statements alleged to have been admitted in violation of *Bruton* held to be harmless); and *Tennessee* v. *Street,* No. 83-2143 (May 13, 1985) (jury instructions were sufficient where co-defendant's confession incriminating the defendant was admitted only as rebuttal evidence).

These cases reflect this Court's unwillingness to assume that juries will not ordinarily follow a trial court's instructions, even when a co-defendant's confession is the subject of the limiting instructions. Indeed, in one of the Court's most recent considerations of *Bruton*, the four-justice plurality made precisely that point. In *Parker* v. *Randolph,* 442 U.S. at 72, the plurality opinion stated that *Bruton* does not apply to cases involving so-called "interlocking confessions." The plurality characterized

Bruton as a limited exception to the fundamental general rule that juries can be trusted to follow a trial court's instructions (442 U.S. at 75 n.7). The *Bruton* exception was created, the plurality opinion explained, "because of the 'devastating' consequences that failure of the jury to disregard a codefendant's inculpatory confession could have to a nonconfessing defendant's case" (*ibid.*). Where the impact of the co-defendant's confession is not as "devastating" as it was in *Bruton*, there is no reason "to require departure from the general rule allowing admission of evidence with limiting instructions" (*id.* at 74-75 (footnote omitted)).[8]

Bruton was thus intended to strike a balance: on the one hand, it recognized that jury instructions will ordinarily protect defendants from the impact of hearsay or other evidence inadmissible against them; on the other hand, it concluded that there may be some co-defendant confessions that are so damaging—in that they clearly identify the complaining defendant as a confederate—that even well-instructed juries may be unable properly to segregate

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[8] The plurality opinion in *Parker* casts some doubt on the continued vitality of *Bruton* altogether. The plurality quoted, with apparent approval, from the pre-*Bruton* decision in *Opper* v. *United States*, 348 U.S. 84 (1954); *Opper* was cited as an instance in which "an instruction directing the jury to consider a codefendant's extrajudicial statement only against its source has been found sufficient to avoid offending the confrontation right of the implicated defendant" (*Parker*, 442 U.S. at 73-74). Significantly, in *Opper* the co-defendant had apparently implicated the complaining defendant quite directly (see *Opper* v. *United States*, 211 F.2d 719, 722-723 (6th Cir. 1954)); the reliance on *Opper* thus may reflect some reluctance to retain even the narrow exception formulated in *Bruton* to the premise that juries can follow instructions. The underpinnings of *Bruton* were again eroded in *Watkins*, which held that instructions were sufficient to protect a defendant from a jury's use against him of unreliable identification testimony—surely as "powerfully incriminating" to a defendant as a co-defendant's confession (see *Watkins*, 449 U.S. at 356 (Brennan, J., dissenting)).

them in their deliberations. To read *Bruton* more broadly upsets this balance of values, by giving too little weight to the fundamental premise of jury competence.

C. A Narrow Construction of *Bruton* Best Serves To Balance The Interests Of Defendants And The Needs Of The Criminal Justice System

The construction of *Bruton* that we urge comports with the balance of interests identified in *Bruton*. It protects a defendant from the impact of a confession that, by naming him or otherwise clearly identifying him as a confederate, is particularly difficult for even a well-instructed jury to ignore. At the same time, however, this construction does not bar the admission in a joint trial of a confession that can only be incriminating to the complaining defendant if the jury considers it in the context of all the other evidence in the case. The inculpatory impact of such a confession is obviously attenuated; as a result, it is more easily set aside in the jury's evaluation of the evidence against the complaining defendant.[9] In light of this

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[9] Of course, reversal might be required if the prosecutor undermined the effect of the limiting instructions by expressly relying on the co-defendant's confession in arguing the defendant's case to the jury, or even by suggesting that the jury should make the connection between the confession and the evidence against the defendant. See, *e.g.*, *United States* v. *Gonzalez*, 555 F.2d 308, 316-317 (2d Cir. 1977) (prosecutor made repeated use of co-defendant's post-arrest statement in summing up the case against defendant); *United States ex rel. Mascia* v. *Zelker*, 450 F.2d 166, 168 (2d Cir. 1971), cert. denied, 406 U.S. 959 (1972) (prosecutor repeatedly sought to connect defendant with a car mentioned in co-defendant's confession).

In this case, contrary to the suggestion of the court of appeals, the prosecutor made no such argument to the jury. The prosecutor did no more than characterize as contrived respondent's claim, on direct examination, that she had heard no conversation in the car en route to Ms. Scott's house (Pet. App. 23a-24a; Tr. 452). Not once did the prosecutor urge the jury to consider Williams' confession against respondent; in fact, he did not even mention the statement in reviewing the

balance of competing interests, it is not surprising that every court of appeals that has addressed the issue—except for the court below— has limited *Bruton* to co-defendant statements that name or otherwise clearly identify the complaining defendant as a participant in the crime.[10]

Any broader reading of *Bruton*—particularly one that requires a trial court to evaluate the confession in light of all the other evidence at trial—would substantially alter pretrial proceedings and the conduct of criminal trials. First, in order to determine whether a particular statement is sufficiently inculpatory, the prosecution would have to divulge, in advance of trial, all the co-defendant statements it intended to use at trial as well as the balance of its anticipated proof, in order that the full evidentiary "context" might be available for defense counsel and the

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evidence against her. To the contrary, the prosecutor expressly reminded the jury that it "would be unfair" to consider Williams' confession against respondent (*id.* at 23a; Tr. 448), an injunction that the trial court reiterated in its final instructions to the jury (Jury Charge Tr. 10). Thus, this is not a case in which the prosecutor, in arguing the defendant's guilt, invited the jury to consider the co-defendant's confession. Compare *Lee* v. *Illinois,* No. 84-6807 (June 3, 1986), slip op. 7 n.3.

[10] See, *e.g., United States ex rel. Cole* v. *Lane,* 752 F.2d 1210, 1216-1217 (7th Cir. 1985); *United States* v. *Satterfield,* 743 F.2d 827, 849 (11th Cir. 1984), cert. denied, No. 84-5941 (May 20, 1985); *United States* v. *Webster,* 734 F.2d 1048, 1054 n.6 (5th Cir.), cert. denied, 469 U.S. 1073 (1984); *United States* v. *Slocum,* 695 F.2d 650, 655 (2d Cir. 1982), cert. denied, 460 U.S. 1015 (1983); *United States* v. *Tavelman,* 650 F.2d 1133, 1139 (9th Cir. 1981), cert. denied, 455 U.S. 939 (1982); *United States* v. *DiGregorio,* 605 F.2d 1184, 1190 (1st Cir.), cert. denied, 444 U.S. 937 (1979); *United States* v. *Belle,* 593 F.2d 487, 493-494 (3d Cir.) (en banc), cert. denied, 442 U.S. 911 (1979). Indeed, until this case, one would have supposed that the Sixth Circuit took the same view. In *United States* v. *Dady,* 536 F.2d 675 (6th Cir. 1976), for example, the court of appeals had refused to apply *Bruton* in a case virtually indistinguishable from this one. See also *Lyle* v. *Koehler,* 720 F.2d 426, 431 n.6 (6th Cir. 1983).

trial court to evaluate. That would impose on the prosecution a discovery obligation going far beyond what is typically required in the federal system and in many states. Surely *Bruton* never contemplated such "an astonishing result" (*United States* v. *Belle*, 593 F.2d at 496).

Moreover, to effectuate this broad reading of *Bruton*, trial courts could not simply rely on a pretrial review of the government's case; in order to appreciate the full evidentiary "context" of the co-defendant's confession, courts would also have to examine the evidence that the defense intended to offer. In this case, for example, it was testimony furnished by respondent herself that persuaded the court of appeals that the co-defendant's confession was "powerfully incriminating."

The implications of such a procedure are forbidding. For one thing, discovery of defense evidence is typically quite limited. See, *e.g.*, Fed. R. Crim. P. 16(b)(2). Moreover, it is likely that even if courts required the defendant to disclose his anticipated proof in advance, at least in camera, they would be reluctant to hold the defendant to his proffer. If they did not, it would be impossible to know, at the time a co-defendant statement was offered, whether unforeseen evidence that might be offered by the defense would later make that statement "powerfully incriminating." Thus, if the "linkage" between the co-defendant's confession and the evidence at trial could be established by the defense evidence, as the court of appeals held in this case, a court would not be able to determine whether a severance was required until late in the trial. What is worse, the "linkage" determination—and thus the requirement of a severance under *Bruton*—would be subject to mid-trial manipulation by the defense. By adjusting his own testimony, or through the careful crafting of his proffer, a defendant would be able to make the co-defendant's confession appear to be potentially damaging and thereby force the trial court to sever the joint trial and

proceed against the defendant alone. The uncertainties that characterize the rule adopted by the court below would make it impossible for courts to determine, in advance of trial, whether a single trial was appropriate, or whether the impact of a non-testifying co-defendant's statement would be so powerfully incriminating that the complaining defendant must be granted a separate trial.

Even in cases in which the court could assess the inculpatory impact of a co-defendant's confession in advance, the lower court's rule would have substantial costs. Once a co-defendant's confession was shown, in context, to have a sufficiently "inculpatory impact," the government would then have two choices: either to refrain from offering the confession even against the confessing defendant, or to agree to sever the trial of each defendant who may be implicated by the statement. The costs of forcing the prosecution to choose between these options, we submit, far outweigh the benefits to the defendant. To abandon the use of confession evidence is obviously undesirable; this Court has made it clear that confessions "are more than merely 'desirable'; they are essential to society's compelling interest in finding, convicting and punishing those who violate the law" (*Moran* v. *Burbine*, No. 84-1485 (Mar. 10, 1986), slip op. 12 (citation omitted)). See also *Oregon* v. *Elstad*, No. 83-773 (Mar. 4, 1985), slip op. 6; *United States* v. *Washington*, 431 U.S. 181, 186-187 (1977); *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 225 (1973). By the same token, it is equally undesirable to grant severances to each and every defendant who is in any way affected by the inculpatory statement. Such a policy would promote enormous inefficiencies: the same evidence would be retread again and again in separate proceedings, wasting both judicial and prosecutorial resources. As this Court noted recently, "joint trials 'conserve state funds, diminish inconvenience to witnesses and public authorities, and avoid delays in

bringing those accused of crime to trial' " (*United States* v. *Lane,* No. 84-744 (Jan. 27, 1986), slip op. 10 (quoting *Bruton,* 391 U.S. at 134)). Severances also increase the opportunities for inconsistent verdicts among similarly situated defendants—a plainly "discomforting" result (*Standefer* v. *United States,* 447 U.S. 10, 25 (1980)). These disadvantages, moreover, would be everyday occurrences, in light of the increasing frequency of multi-defendant prosecutions.

Nothing in *Bruton* or the policy underlying it requires that the criminal justice system absorb such significant costs on a regular basis. The Court in *Bruton* isolated a narrow category of co-defendant statements that a jury, even with limiting instructions, might not be entrusted to ignore in its deliberations. That category—co-defendant confessions that clearly identify the complaining defendant as a participant in the crime—is well-defined and can be applied easily by prosecutors and trial courts. To expand the category of "powerfully incriminating" statements to include those that, as redacted, do not even refer to the complaining defendant would give *Bruton* a meaning this Court never intended it to have. In addition, it would ignore the central premise of our system of jury trials: that, except in rare cases, juries can, and do, follow the instructions of trial courts.

CONCLUSION

The judgment of the United States Court of Appeals should be reversed.

Respectfully submitted.

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